

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

321

FOR MR. JUSTICE VAN DUSEN

6

TRANSCRIPT OF RECORD

United States Court of Appeals for the District of Columbia

APRIL TERM, 1935

No. 6454

707

MURRAY BALDWIN, INDIVIDUALLY, AND MURRAY
BALDWIN AND DAVID COSGRAVE, EXECUTORS
OF THE ESTATE OF JANET BALDWIN, DE-
CEASED, APPELLANTS;

v.s.

NATIONAL SAVINGS AND TRUST COMPANY, A
CORPORATION, TRUSTEE UNDER THE LAST
WILL AND TESTAMENT OF ALICE KEY BROWNE,
DECEASED.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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APRIL TERM, 1935

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BALDWIN AND DAVID COSGRAVE, EXECUTORS
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vs.

NATIONAL SAVINGS AND TRUST COMPANY, A
CORPORATION, TRUSTEE UNDER THE LAST
WILL AND TESTAMENT OF ALICE KEY BROWNE,
DECEASED, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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United States Court of Appeals for the District of Columbia

No. 6454.

MURRAY BALDWIN, Individually, and MURRAY BALDWIN and
DAVID COSGRAVE, Executors &c., Appellants,

vs.

NATIONAL SAVINGS AND TRUST COMPANY, a Corporation,
Trustee &c.

a Supreme Court of the District of Columbia.

Equity.

No. 56951.

NATIONAL SAVINGS AND TRUST COMPANY, a Corporation,
Trustee under the Last Will and Testament of Alice Key
Browne, Deceased, Plaintiff,

vs.

EDWARD TURNER MESSERSMITH, et al., Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the
District of Columbia, at the City of Washington, in said
District, at the times hereinafter mentioned, the following
papers were filed and proceedings had, in the above-entitled
cause, to wit:

Bill for Construction of Will.

Filed March 27, 1934.

In the Supreme Court of the District of Columbia, Holding
an Equity Court.

Equity.

No. 56951.

NATIONAL SAVINGS AND TRUST COMPANY, a Corporation,
Trustee under the Last Will and Testament of Alice Key
Browne, Deceased, 15th Street & New York Avenue, N.
W., Washington, D. C., Plaintiff,

vs.

1 EDWARD TURNER MESSERSMITH, 22 via Paradiso, Siena,
Italy; 2 Richard M. Cutts, Headquarters, United States
Marine Corps, Washington, D. C.; 3 Alice G. Cutts My-
ers, c/o 100 Harrison Street, San Francisco, California;
4 Daniel K. Turner, Jr., 730 Valla Vista Avenue, Oak-
land, California; 5 Anna Key Palmer, 761 Post Street,
San Francisco, California; 6 Murray Baldwin, Individ-
ually, 1487 Greenwich Street, San Francisco, California;
7 David Cosgrave, Executor of the Estate of Janet M.
Baldwin, Deceased, Doxsee Building, Redwood City, Cali-
fornia; and 8 Murray Baldwin, Executor of the Estate of
Janet M. Baldwin, Deceased, Doxsee Building, Redwood
City, California; 9 Wells Fargo Bank and Union Trust
Company, a Corporation, Assignee, of Daniel K. Turner,
Jr., Market Street at Montgomery, San Francisco, Cali-
fornia, Defendants.

2 The bill of complaint of the National Savings and
Trust Company, trustee under the last will and tes-
tament of Alice Key Browne, deceased, respectfully shows
to the Court:

1. Your plaintiff is a corporation existing under and by
virtue of the laws of the United States applicable to the
District of Columbia and is engaged in conducting a bank-
ing and trust company business in said District, and brings

this suit as the trustee named in and by the last will and testament of Alice Key Browne, deceased, having been nominated such trustee under the name of The National Safe Deposit Savings and Trust Company of the District of Columbia, its former corporate name.

2. The defendants Edward Turner Messersmith, Richard M. Cutts, Alice G. Cutts Myers, Daniel K. Turner, Jr., Anna Key Palmer and Murray Baldwin are of lawful age, citizens of the United States and reside at the various addresses as shown in the caption hereof, which are prayed to be read and considered as a part hereof, as though set forth fully and at large herein. Said defendants are all of the persons now interested in the estate of the said Alice Key Browne, deceased, and are sued herein with respect to their individual interest in said estate, with the exception of the defendant Murray Baldwin, who is sued individually and also as one of the executors of the estate of Janet M. Baldwin. The defendant David Cosgrave is a citizen of the United States and a resident of the State of California and is sued herein as one of the executors of the estate of said Janet M. Baldwin, deceased. The defendant Wells Fargo Bank and Union Trust Company is a corporation duly organized and existing under and by virtue of the laws of the State of California, and is sued herein as assignee of the interest of the said Daniel
3 K. Turner, Jr., in said estate, as hereinafter more fully shown.

3. Heretofore, on or about the 21st day of March, 1905, the said Alice Key Browne, late a citizen of the United States and a resident of the District of Columbia, departed this life therein leaving a last will and testament which was duly admitted to probate and record by this Honorable Court, sitting as a probate court, by order passed on the 17th day of April, 1905, in the cause known on the dockets of said probate court as administration number 12811, and letters testamentary were issued thereunder to your plaintiff by the name of the National Safe Deposit Savings and Trust Company of the District of Columbia.

In and by said last will and testament the said Alice Key Browne, by Item LIX thereof, gave, devised and bequeathed to your plaintiff, its successor and assigns, all the rest, residue and remainder of her property and estate

after the payment of certain specific legacies referred to in said will, in and upon the following uses and trusts, namely to invest and keep the same invested and out of the net income therefrom to make certain payments during the lifetime of persons designated by said testatrix upon the conditions as more fully set forth in said will.

In and by Items LXI and LXII of said last will and testament said decedent provided as follows with respect to the disposition of any surplus income which might remain after the payment of the sums provided by Item LIX aforesaid, as follows:

“Item LXI. Should any income from my estate remain after payment of the bequests hereinbefore mentioned, such surplus income shall be invested and allowed to accumulate for a period of three years, when it shall be divided into two equal parts; one of such parts shall be
4 distributed among my brothers and sisters mentioned as beneficiaries of the residuary portion of my estate, or their survivors, share and share alike; and the other portion shall be added to the corpus of my estate. This accumulation shall continue during consecutive periods of three years, and at the end of each period of three years, distribution shall be made in the manner above mentioned.

Item LXII. Upon the death of the last survivor of my four sisters, Ellen K. Messersmith, Elizabeth H. Turner, Janet M. Baldwin and Emily Virginia Cutts, and of my two brothers, Daniel K. Turner and Frank K. Turner, I direct my Trustee to convert my entire estate then remaining (with the exception of the parts, if any, to be set aside for my cousins) into cash, and divide the same equally among my nephews and nieces, Edward Turner Messersmith, Murray Baldwin, Richard M. Cutts, Daniel Turner, Junior, Anna Mace and Alice G. Cutts Myers. Should any of said nephews or nieces be then dead, the share which he, she or they would have received if living, shall be paid in equal shares to his, her or their children then living. Should such deceased nephews or nieces have died without issue, his, her or their share or shares shall be divided among the survivors, or their respective issue.”

For certainty as to any and all of the terms and provisions of said last will and testament reference is hereby

made to a true copy thereof which is hereto attached marked "Exhibit A" and prayed to be read and considered as a part hereof as though the same were set forth fully and at large herein.

Your plaintiff entered upon the duties imposed upon it by said last will and testament and has faithfully discharged the same to the present time.

4. The brothers and sisters mentioned as the beneficiaries of the residuary portion of the estate of said testatrix are the same as those specifically named in and by Item LXII of said will aforesaid, namely, Ellen K. Messersmith, Elizabeth H. Turner, Janet M. Baldwin,
5 Emily Virginia Cutts, Daniel K. Turner and Frank K. Turner, all of whom are now dead, the last survivor of them being the said Janet M. Baldwin who, your plaintiff is informed and believes and therefore avers, died in the State of California on the 22d day of January, 1934. Your plaintiff is further informed and believes and therefore avers, that the defendants Murray Baldwin and David Cosgrave, have been, by order of the Superior Court of the City and County of San Francisco, California, appointed executors of the estate of the said Janet M. Baldwin.

5. Pursuant to the aforesaid directions contained in the last will and testament of the said Alice Key Browne relating to the surplus income from her residuary estate and contained in the aforesaid Item LXI thereof, your plaintiff has stated triennial accounts thereof to the beneficiaries entitled to one-half of said accumulated income and has distributed the said one-half of said accumulated income to and including the 17th day of April, 1932, said distribution as of said last mentioned date being made to the said Janet M. Baldwin as the last survivor of the brothers and sisters of said testatrix entitled thereto. At the time of the death of the said Janet M. Baldwin on the 22d day of January, 1934, as aforesaid there had accrued as income since said last triennial account the sum of \$27,406.66, as shown by the statement of account which is hereto attached, marked "Exhibit B" and prayed to be read and considered as a part hereof.

6. Subsequent to the death of the said Janet M. Baldwin on the 22d day of January, 1934, as aforesaid, the defendants Murray Baldwin and David Cosgrave, as executors aforesaid, notified your plaintiff that it was their conten-

tion the said Janet M. Baldwin had a vested interest in one-half of the surplus income hereinbefore referred to accumulated from the date of the last distribution thereof on April 17, 1932, to the date of the death — the said Janet M. Baldwin, and that by reason thereof the estate of the said Janet M. Baldwin was entitled to receive from your plaintiff, as trustee, one-half of said net income which, according to the statement of account attached hereto as Exhibit A, amounts to one-half of the sum of \$27,179.60 or the sum of \$13,589.80, and said defendants requested that the necessary steps be taken to protect said interest.

7. Thereafter, certain of the other defendants notified your plaintiff that it was their claim that the said Janet M. Baldwin did not have a vested interest in said accumulated income aforesaid and that the whole of said income should be distributed to the nieces and nephews of said decedent Alice Key Browne in accordance with the provisions of Items LXI and LXII of said last will and testament as aforesaid, said nieces and nephews being the defendants hereto and the defendant Wells Fargo Bank and Union Trust Company, as assignee of the interest of the defendant Daniel K. Turner, Jr.

8. Your plaintiff is informed and believes, and therefore avers, that by a certain paper writing dated on or about the 6th day of September, 1911, the defendant Daniel K. Turner, Jr., by the name of Daniel Key Turner assigned to the defendant Wells Fargo Bank and Union Trust Company, by the name Union Trust Company of San Francisco, its predecessor in interest, in and upon certain uses and trusts therein set forth, an undivided one-half interest of all money or property to which the said Daniel K. Turner might be entitled upon the termination of the trust created by the last will and testament of Alice Key Browne, deceased, and, by a further paper writing dated on or about the 26th day of January, 1934, assigned to the defendant Wells Fargo Bank and Union Trust Company the remaining undivided one-half interest in said trust estate as security for the repayment to the said Wells Fargo Bank and Union Trust Company of the sum of \$1,000 borrowed by the said Daniel Key Turner. Your plaintiff is without knowledge, however, as to the exact status of said assignments at the present time and the amount, if

any, the defendant Wells Fargo Bank and Union Trust Company may be entitled to thereunder.

9. Your plaintiff is advised that the controversy and contention between the parties is such that it cannot with safety decide between them and that under such circumstances it is entitled to the protection of this Honorable Court in making distribution of said accumulated income as aforesaid.

Wherefore, the premises considered, your plaintiff prays:

1. That process be issued out of this Honorable Court commanding the defendants, and each of them, to appear herein on a day certain and answer the exigencies of this bill.

2. That for such of said defendants as cannot be personally served with process it may have such orders of publication as may be necessary.

3. That this Honorable Court will ascertain and determine the proper distribution of the accumulated income of the trust estate created in and by said last will and testament of Alice Key Browne, deceased, since the last triennial statement rendered by your plaintiff as of April 17, 1932, and by its decree to be entered herein instruct and direct your plaintiff as to the proper distribution thereof.

4. And for such other and further relief as the nature of the case may require and to the Court seem just and proper to grant, including reasonable counsel fees and costs paid out by your plaintiff in connection with this proceeding.

8 NATIONAL SAVINGS AND TRUST
 COMPANY,
 Trustee Under the Last Will and Testa-
 ment of Alice Key Browne, Deceased,
 By FRANK STETSON,
 First Vice-President & Trust Officer.

MINOR, GATLEY & DRURY,
By ARTHUR P. DRURY,
 Attorneys for Plaintiff.

DISTRICT OF COLUMBIA, ss:

Frank Stetson, being first duly sworn, deposes and says:
I am First Vice-President of the National Savings and

Trust Company, plaintiff in the above-entitled cause. I have read over the foregoing bill of complaint by me subscribed and know the contents thereof. The matters and things therein stated are true, as I verily believe.

FRANK STETSON.

Subscribed and sworn to before me this 23d day of March, 1934.

[SEAL.]

JEAN SPEAKS,
Notary Public, D. C.

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PLANTIFF'S EXHIBIT No. 1

National Savings and Trust Company.

Trust Department.

Distribution of the Surplus Income under the Terms of Item LXI of the Last Will and Testament of Alice Key Browne, Deceased.

Admitted to Probate and Record April 17, 1905.

January 22, 1934.

Income from April 17, 1932, to January 22, 1934...	39,178.51	
Less accrued interest to date of purchase of investments.....	313.25	
	<u>38,865.26</u>	
Miscellaneous Receipt.....	1.00	
Payments made in accordance with Item LXI of Will from April 17, 1932, to December 31, 1933.....		6,720.32
Intangible tax for 1933 and 1934.....		2,262.16
Income tax for 1931, 1932 and 1933.....		533.25
Miscellaneous expenses in re collection of coupons ..		.61
National Savings and Trust Company, commission 5% on \$38,865.26.....		1,943.26
Balance.....		<u>27,406.66</u>
	<u>38,866.26</u>	<u>38,866.26</u>
	27,406.66	

Said balance is distributable and partially distributed as follows:

Estate of Janet M. Baldwin, annuity accrued from Dec. 31, 1933, to Jan. 22, 1934.....		56.77
Daniel Turner, Jr., ditto.....		56.77
Richard M. Cutts, annuity accrued from Dec. 31, 1933, to Jan. 22, 1934.....		28.38
Alice Cutts Myers, ditto.....		28.38
Anna Key Palmer, ditto.....		28.38
E. Turner Messersmith, ditto.....		28.38
Balance, forward.....		<u>27,179.60</u>
	<u>27,406.66</u>	<u>24,406.66</u>
	27,179.60	

Said balance, forward, consisting of all cash is held pending determination of the right of the Estate of Janet M. Baldwin, deceased, to share therein

.....	27,179.60
<u>27,179.60</u>	<u>27,179.60</u>

EXHIBIT "A"

THE LAST WILL AND TESTAMENT

of

ALICE KEY BROWNE.

-oooOooo-

I, ALICE KEY BROWNE, of the City of Washington, District of Columbia, do make, publish and declare this to be my last Will and Testament, hereby revoking and annulling any and all Wills and Codicils by me at any time heretofore made.

ITEM I. I direct my Executor hereinafter named to pay all of my just debts and funeral expenses as soon after my decease as may be convenient.

ITEM II. I direct that my remains shall be deposited by the side of those of my late husband, Doctor J. Mills Browne, deceased, in my lot at Arlington National Cemetery, Virginia.

ITEM III. I give and bequeath unto my sister, Ellen K. Messersmith, for use during her life, my tea caddy, which belonged to the Lloyds; the portrait of my grandfather, Francis Scott Key, the valance on mantel in library, and the French travelling clock in my bedroom. Upon the death of my sister, or if she should die during my lifetime, the above-named articles are to go absolutely to her son, Turner Messersmith.

I give and bequeath unto my said sister, Ellen K. Messersmith, absolutely, the portrait of my deceased husband, Doctor Browne, in my bedroom; my blue and gold Japanese sofa cushion; the landscape in red mat hanging

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over table; one of my black silk dresses; one of Boydell's Shakespeare prints, "Merchant of Venice", presented to my grandmother by John Randolph, of Roanoke; the blue rug in the hall; also the pillow cushion, designed in pine cones, which she worked for me and gave me at Christmas, 1902. Should my said sister die during my lifetime, the above-mentioned articles bequeathed to her absolutely shall go absolutely to her children, Turner Messersmith and Anna K. Palmer.

ITEM IV. I give and bequeath unto my sister, Elizabeth H. Turner, my silver spoons and all plated ware; my best knives and all plated forks (excepting, however, those marked "J.M.B." or "J.M.T.", which were given to me by my sister, Mrs. Baldwin; also the punch ladle given to Doctor Browne by my sister, Mrs. Baldwin, which are to be returned to her). I also exempt from the above bequest to Mrs. Turner all antique and souvenir spoons, and all antique pieces of silver, which I intend to leave to different friends. I give and bequeath to my said sister, Mrs. Turner, one of Boydell's Shakespeare prints, representing "Henry IV"; also my sealskin coat and muff; my laurel wood center table; the picture of a girl dressed for the ball; the library rug and one of the rugs in the outside hall; my workstand and sewing machine; the black cabinet with glass door, now filled with French books; my mahogany bedstead and small Dutch glass. Upon the death of my said sister, Mrs. Turner, I direct my Executor to provide the sum of at least Three Hundred Dollars (\$300.), which shall be expended for the funeral expenses or doctors' bills of my said sister.

Should my said sister die during my lifetime,

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the articles bequeathed to her shall be distributed equally among my sisters and my sister-in-law, Mrs. Turner.

ITEM V. I give and bequeath unto my sister, Mrs. J.M. Baldwin, my silver pitcher and my own special writing desk; also all silver spoons marked "J.M.B." or "J.M.T."; the punch ladle which was given by her to my late husband, Doctor Browne, (this, however, I shall probably give to her before my death) my ivory brushes marked "J.M.B."; my small silver waiter marked with the Lloyd coat of arms; the chair belonging to my writing desk, and all articles in china, with silver scissors, belonging to my writing desk; my black jet pin, which belonged to my mother; the oil painting of "Church at Stoke Pogis" which she gave me; also two or the Boydell Shakespeare prints from "The Taming of the Shrew"; the long red rug in the hall; the Dutch inlaid table (crescent-shaped) in the parlor; the Bible given to me by my dear parents, in which is a little Christmas card -- the last my mother sent me.

Should my said sister die during my lifetime, the articles above bequeathed to her are to be given to her son, Murray Baldwin, Captain in the United States Army.

ITEM VI. I give and bequeath unto my sister, Mrs. Richard M. Gutts, the mantel glass in library; antique mahogany chair; the likeness of Doctor Browne over my writing desk; also the likeness of Mrs. John T. Myers, her daughter; the coffee pot purchased at Mr. Lowndes' sale, which belonged to my great grandmother, Mrs. Lloyd. (This coffee pot I desire to go to her daughter, Alice Myers, after her death.) Also my point lace collar; my

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black enameled pin with amethyst in center; also my small pin with pearls and sapphire; the three large parlor rugs and the two small ones in the bay window; the brass clock and candelabra on mantel; all china in Canton blue; the card table of inlaid mahogany in parlor; the blue sofa cushion with center in Chinese embroidery, which was given to me by Mrs. Cutts; the antique silver tea caddy which Doctor Browne purchased in Holland; the small antique silver coffee spoons; the two Boydell Shakespeare prints from "Romeo and Juliet" in bedroom; the water-color marine view hanging over sofa; the Bohemian glass set -- decanter, twelve glasses and finger bowls -- which was left to me by Mrs. Taylor, and my camel's hair shawl.

In the event of the death of my said sister, Mrs. Cutts, during my lifetime, the above articles, with the exception of the coffee pot, which goes to her daughter, Alice Myers, are to be given to her children, Lieutenant Richard M. Cutts, and Alice Myers.

ITEM VII. I give and bequeath unto my brother, Frank K. Turner, the bedroom carpet and bedroom rugs, curtains, and one rug in outside hall; also jar on book-case representing a flock of ducks. Upon his death and that of his wife, I direct my Executor to expend not less than One Hundred Dollars (\$100.) in payment of the funeral expenses of each of them.

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Should my brother die during my lifetime, all of the articles above mentioned are to be given to his wife, and in the event of the death of both of them during my lifetime, the articles above mentioned are to be distributed equally among my surviving sisters residing in California.

ITEM VIII. I give and bequeath unto my dear brother, Daniel Turner, the punch bowl which belonged to my grandfather, Governor James Turner, of North Carolina; the silver salver, engraved with the Lloyd coat of arms, which belonged to my great grandfather, Edward Lloyd; two Boydell Shakespeare prints hanging over the sideboard in the library, representing "Characters from Henry IV"; also the rug between the library and bedroom; the Morris chair in parlor, and the blue stone jar of Coblenz ware.

Should my brother die during my lifetime, all of the above articles are to go to his son, Daniel Turner, Jr.

ITEM IX. I give and bequeath unto my nephew, Turner Messersmith, the Lloyd silver cup, which I have had engraved with his initials; the cut-glass decanter in pineapple pattern, which belonged to his maternal grandparents; the painting of "The Cardinal"; the book of engravings bound in vellum; the antique gold Egyptian ring, with a carved apis in center, which belonged to Doctor Browne; the book on Japan, by Mortimer Menpes, in which I have written his name; the blue Japanese vase on mantel, which is very valuable, being valued at over One Hundred Dollars.

ITEM X. I give and bequeath unto my niece, Anna K. Palmer, the bed quilt commenced by her great grandmother and finished by her grandmother and myself, and the antique Dresden vase; also my diamond pin, which is by far my most

This by Browne

valuable article of jewelry. In case of her death, without children, I request her to bequeath it to some female member of my family. I also give her one number of the Anglo Saxon Magazine.

ITEM XI. I give and bequeath unto my niece, Alice G. Cutts Myers, the urn-shaped sugar bowl which formerly belonged to my great great aunt, Mrs. Washington; my cashmere shawl and scarf; my white cashmere table cover; the Japanese embroidery in gold on blue satin; the embroidery in various colors worked by me; the silver cup given to me by Aunt Howard and having my initials; the blue silk Japanese bed cover and bolster cover; the blue china table in bay window; the French clock on my desk; the water-color landscape over sideboard in parlor; the bronze dove; the rug between parlor and hall; the antique money safe in silver; the small bon-bon dish of silver; my gold watch and chain; my two diamond rings; my enameled cross with clover leaf center (this is a Masonic cross which belonged to Doctor Browne); also all the china in the lower part of the corner cupboard; also my Colonial Dame Badge and all of my papers relating to the Society of Colonial Dames. After the distribution of the small silver, all that may remain I give to my said niece, Alice G. Cutts Myers.

To her husband, John Twiggs Myers, I give my cameo ring; also one of the silver cigar cases which belonged to Doctor Browne.

In case of the death of said Alice G. Cutts Myers during my lifetime, without children, the above-mentioned articles are to go to my sister, Mrs. Cutts, and if she is not living, they are to go to Richard M. Cutts, or to his

Alice G. Cutts Myers
John Twiggs Myers

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ITEM XII. I give and bequeath unto my nephew, Richard M. Cutts, the clock on mantel in library, which is an antique called "Napoleon"; the oil painting over mantel in library, and the picture of chickens over the heater in library; also the jar of Coblenz ware representing "Lazarus"; also the elk horns in outside hall and the pair of steenbok horns; also the cut-glass decanter with silver coaster, formerly owned by his maternal great great grandparent, Edward Lloyd; also one of the silver cigar cases which belonged to Doctor Browne. These cases must be drawn for by lot and one given to Richard M. Cutts and the other to John Twiggs Myers above mentioned.

Should said Richard M. Cutts die during my lifetime, the above articles are to be given to his wife and children.

ITEM XIII. I give and bequeath unto Margaret Cutts, wife of my nephew, Richard M. Cutts, one volume of the Anglo Saxon Magazine; also Hindu bracelet of silver and two small plated vases for plants; also the red cashmere table cover and vase and cup and saucer Capo del Monte with cover; also the embroidery in white on blue satin over my desk in parlor.

ITEM XIV. I give and bequeath unto the Washington Club my book-cases with curtains and the one with sliding doors, and all others save the black one in ebony finish, together with all of my library excepting the Encyclopedia Britannica and one hundred books, which I have hereinafter given to my nephew, Murray Baldwin.

ITEM XV. I give and bequeath unto my nephew, Murray Baldwin, my Encyclopedia Britannica and his choice of one hundred (100) books from my library. I suggest to

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him that he choose books of reference; also all of the Masonic jewels which belonged to Doctor Browne, with the exception of the enameled cross with clover leaf in center. I also bequeath to him the cut-glass decanter which belonged to the Scotch Highlanders who were once stationed at Saint Helena, and which was presented to Doctor Browne; also the silver coaster which belonged to his great grandparent, Edward Lloyd. I also give to him Doctor Browne's signet ring, in token of the regard Doctor Browne had for him.

In case of his death before his mother's, I request him to bequeath Doctor Browne's signet ring to Daniel Turner, Junior, and the Masonic jewels to Turner Messersmith and R.M. Cutts, and in such event I desire his mother to retain decanter and coaster, and books if she desires them.

ITEM XVI. I give and bequeath my pew in Saint John's Church, in the City of Washington, District of Columbia, unto the said church, with the request that any of my sisters who may survive me may have the privilege of renting it before any one else.

ITEM XVII. I give and bequeath unto the Cosmos Club, of the City of Washington, District of Columbia, my large vase known as the Garfield vase, as a memento of my late husband, long a member of said Club.

ITEM XVIII. I give and bequeath unto the Metropolitan Club, of the City of Washington, District of Columbia, my tall clock, known as a Grandfather's clock, as a memento of my late husband.

ITEM XIX. I give and bequeath unto my dear nephew,

Alice Mary Browne

Daniel Turner, Junior, in token of love and affection, the painting of "The Bull Fighter in the Arena"; also the painting "The Winter Scene"; also One Hundred Dollars (\$100.) which I direct to be paid to his father, or to his aunt, Janet M. Baldwin, for his benefit. The payment is to be made within ten or twelve months after my death. In case of his death during my lifetime, the above-mentioned paintings and money are to go to his father, and should his father not be living at the time of my death, they are to be equally divided between Mrs. Baldwin and Mrs. E.V. Cutts, his aunts.

ITEM XX. I give and bequeath unto my cousin, Mrs. Arthur T. Brice, the silver tea strainer which belonged to the Lloyds; also the plaque over the mantel in parlor.

ITEM XXI. I give and bequeath unto Mr. Arthur T. Brice, the mahogany cellaret in the library.

ITEM XXII. I give and bequeath unto each of the children of Mr. and Mrs. Arthur T. Brice the sum of Twenty Dollars (\$20.00). I direct that this money be paid to Mr. Brice for the benefit of the children.

ITEM XXIII. I give and bequeath unto my cousin, Mrs. John Rutledge Abney, the Bohemian tankard on mantel and the Copenhagen silver fish.

ITEM XXIV. I give and bequeath unto my cousin, Mary Anderson, now residing at the Louise Home, in the City of Washington, my rocking chair in the library.

ITEM XXV. I give and bequeath unto my friend, Doctor William K. Van Reypen, the desk and chair which be-

longed to Doctor Browne and all the articles belonging to the desk, such as inkstands and paper weights.

ITEM XXVI. I give and bequeath unto my friend, Mrs. Van Reypen, the French inlaid sideboard in the parlor; the green vase with the decorations of crows, and the small silver dish engraved with Copenhagen veterans and with the name of Doctor Browne. This was a dinner card given by Doctor Tryon.

ITEM XXVII. I give and bequeath unto Alletta Van Reypen one Anglo Saxon Magazine.

ITEM XXVIII. I give and bequeath unto General Card my oak carved chair.

ITEM XXIX. I give and bequeath unto Mrs. Card my cut-glass pitcher.

ITEM XXX. I give and bequeath unto Edith Card, Alice Card, Edith Benham and Janie Gilmore one Anglo Saxon Magazine each.

ITEM XXXI. I give and bequeath unto my friend, Mrs. Johnson, the blue Bohemian glass vases on the mantel in the library.

In case of her death during my lifetime, the vases are to be given to her daughter, Isabel Johnson, to whom I also give one Anglo Saxon Magazine.

ITEM XXXII. I give and bequeath unto Harry Holton, the great nephew of Doctor Browne, the watch and chain which formerly belonged to Doctor Browne.

In case of the death of Harry Holton during my lifetime, the watch and chain are to go to Freddie Holton, son of William Holton.

Alice Van Browne

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ITEM XXXIII. I give and bequeath unto George D. Holton, Doctor Browne's nephew, his sword and belt; also the silver set presented to Doctor Browne by the Masonic Order in California.

In case of his death during my lifetime, the above-mentioned articles are to go to my sister, Mrs. Cutts.

ITEM XXXIV. I give and bequeath unto my maid, Annie Vawter, the sum of One Hundred Dollars (\$100.00), which I direct to be paid to her during the year following my death; also the oak bureau in cabinet in library; the two chairs in bedroom; the rocking chair and the table in light wood now in library; also all cooking utensils; gas stove; also all rugs in my bedroom and the rug in the bathroom; also all needles, pins, thread, and all working materials, and also the pitcher and basin and other articles belonging to my washstand.

ITEM XXXV. I give and bequeath unto each of my friends, Mrs. Foster, Mrs. Myers and Miss Hewett, in case they survive me, one teacup and saucer to be selected by them from those in the corner cupboard.

ITEM XXXVI. I give and bequeath unto Doctor Fletcher the Japanese bronze candlesticks.

ITEM XXXVII. I give and bequeath unto my friend, Marie S. Patterson, small silver loving cup; also the Aztec calendar.

ITEM XXXVIII. I give and bequeath unto Mrs. Knox Taylor one cup and saucer to be selected by her.

ITEM XXXIX. I give and bequeath unto Mrs. Merrill one cup and saucer to be selected by her.

Annie May Browne

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ITEM XL. I give and bequeath unto Clara Emory the Italian vase with legs.

ITEM XLI. I give and bequeath unto Lizzie Tilton Japanese tall mug and saucer.

ITEM XLII. I give and bequeath unto Mrs. Tilton the Bohemian vase.

ITEM XLIII. I give and bequeath unto Mrs. Lambertine one cup and saucer to be selected by her; also yellow Chinese teapot.

ITEM XLIV. I give and bequeath unto Mrs. Mallory one teacup and saucer to be selected by her, and also one Anglo Saxon Magazine.

ITEM XLV. I give and bequeath unto each of the Misses Schenck one of the small silver boxes on the blue table, in remembrance of me.

ITEM XLVI. I give and bequeath unto Mrs. William Pendall cup and saucer in cabinet.

ITEM XLVII. I give and bequeath unto Mrs. Florence Woods one Anglo Saxon Magazine, and also the teapot in metal which formerly belonged to her father, and which she gave me.

ITEM XLVIII. I give and bequeath unto Alice Blunt the small mahogany footstool, the cover of which was worked by her mother; also the sum of Twenty-five Dollars (\$25.).

ITEM XLIX. I desire that all of my wearing apparel and all furniture, other than the articles heretofore specifically bequeathed, be divided equally by lot among

Alice May Browne

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and Mrs. Cutts, and my sister-in-law, Mrs. Turner.

ITEM L. I give and bequeath unto Henry Sweeney, my waiter, if he survives me, Ten Dollars (\$10.00).

ITEM LI. I give and bequeath unto Mary Brock, if she is my laundress at the time of my death, Ten Dollars (\$10.00).

ITEM LII. I give and bequeath unto my former maid, Louise Johnson, Ten Dollars (\$10.00).

ITEM LIII. I desire that the two chairs of rosewood, inlaid with brass, which were formerly the property of Chief Justice John Marshall, be given to the National Museum, in honor of that distinguished man. If I have elsewhere otherwise disposed of these chairs, I revoke such portion of my Will.

ITEM LIV. I request my two dear friends, Doctor Van Keypen and Mr. Arthur T. Brice, to jointly or separately assist my Executor in the distribution of the articles left to friends. In the distribution, I give them great latitude, and authorize them if they so desire, to procure the assistance of their wives: I direct that neither my Executor nor my said friends shall be in any manner accountable or responsible to any one for such distribution.

ITEM LV. To Doctor Van Reyphen I leave the disposition of letters, diaries, and such other things as have no intrinsic value (such as magazines), many of which are in the drawers of the desks belonging to Doctor Browne and myself; also the burning of all letters or notes, unless I hereafter make exceptions of some which I may select to be given to my family. These will be arranged in bundles

Miss Key Browne

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and the names of the persons to whom they are to go written thereon.

ITEM LVI. Annie Vawter, my faithful maid, can render valuable assistance, as she is thoroughly acquainted with my possessions. I direct that she be paid Fifteen Dollars (\$15.00) per month until the distribution is made, which I hope will be with as much speed as possible.

ITEM LVII. I give and bequeath unto Rebecca Norwood, wife of Phillip P. Norwood, of Texarcana, Texas, in case she shall survive me, the sum of One Hundred Dollars (\$100.).

ITEM LVIII. I give and bequeath unto Ellen Leary, daughter of said Rebecca Norwood, in case she shall survive me, the sum of One Hundred Dollars (\$100.).

ITEM LIX. I give, devise and bequeath unto The National Safe Deposit, Savings and Trust Company of the District of Columbia, its successors and assigns, absolutely and in fee simple, according to the nature of the property and estate, personal and real, of which I shall die seized and possessed, or in which I shall have any interest or estate, legal or equitable, at the time of my death;

To have and to hold the same unto and to the use of the said The National Safe Deposit, Savings and Trust Company of the District of Columbia, its successors and assigns;

In and upon the following uses and trusts, and none other, that is to say:

In trust to invest and keep invested, with power of sale and reinvestment at any time, all of my property

Alcie May Browne

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and estate in some safe income-producing and marketable bonds and stocks or promissory notes secured by first deed of trust upon improved real estate situate and lying in the District of Columbia, and to collect and receive the income, interest and dividends arising therefrom and accruing thereon, and after payment of all necessary costs, charges and expenses incurred in such collection, to make the following payments:

First: To pay to my brother, Daniel Turner, the sum of Eighty Dollars (\$80.00) per month for and during the period of his natural life, in case he shall survive me; from and after the death of my brother, or from and after my death should he not survive me, to pay to his son, Daniel Turner, Junior, the sum of Eighty Dollars (\$80.00) per month during the term of his natural life, or until the final distribution of my estate hereinafter provided for. My reason for making this payment to my nephew so large arises from the fact that he is now the only nephew I have under the age of twenty-one years, and his position in life is not yet secured.

My brother shall also share in the triennial distribution of surplus income hereinafter mentioned.

Second: To pay to my sister, Elizabeth H. Turner, the sum of One Hundred and Twenty-five Dollars (\$125.) per month during the term of her natural life, in case she shall survive me. My said sister shall also share in the triennial distribution of surplus income hereinafter mentioned.

Upon the death of my said sister, my Trustee shall pay to her son, John Temple Grayson, Junior, the sum of One Hundred Dollars (\$100.). Upon the final distribution

Alie Gray

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of my estate hereinafter provided for, my Trustee shall pay to said John Temple Grayson, Junior, the further sum of One Thousand Dollars (\$1,000.) provided my estate shall amount to at least Sixty Thousand Dollars (\$60,000.); should my estate be less than that amount in value, said John Temple Grayson, Junior, shall receive but one-sixtieth (1/60) of my estate. My reason for thus discriminating against my nephew, which reason I desire him to know, is due to the fact that he has been disloyal and undutiful toward his mother, and at the age of twenty-one years left his mother and has since been living with his father, who for more than ten years contributed nothing to his support.

Third: To pay to my sister, Ellen K. Messersmith, the sum of Eighty Dollars (\$80.) per month during the term of her natural life, in case she shall survive me; from and after her death my Trustee shall pay the sum of Forty Dollars (\$40.) per month to her daughter, Anna Mace, and the sum of Forty Dollars (\$40.) per month to her son, Edward Turner Messersmith; these payments to continue during the respective lives of my said niece and nephew, or until the final distribution of my estate hereinafter provided for.

Fourth: To pay to my brother, Frank K. Turner, the sum of Fifty Dollars (\$50.) per month during the term of his natural life, in case he shall survive me; from and after his death my Trustee shall pay to his widow, Mathilda Turner, the sum of Fifty Dollars (\$50.) per month during the term of her natural life, or until the final distribution of my estate hereinafter provided for.

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Fifth: To pay to my sister, Mrs. Janet M. Baldwin, the sum of Eighty Dollars (\$80.) per month during the term of her natural life, in case she shall survive me; from and after her death my Trustee shall pay to her son, Murray Baldwin, the sum of Forty Dollars (\$40.) per month during the term of his natural life, or until the final distribution of my estate hereinafter provided for.

Sixth: To pay to my sister, Mrs. Emily Virginia Cutts, the sum of Eighty Dollars (\$80.) per month for and during the term of her natural life, in case she shall survive me; from and after her death my Trustee shall pay the sum of Forty Dollars (\$40.) per month to her son, Richard M. Cutts, and the sum of Forty Dollars (\$40.) per month to her daughter, Alice G. Cutts Myers; these payments shall continue during the respective lives of my nephew and niece, or until the final distribution of my estate hereinafter provided for.

Seventh: To pay to my cousin, Mary Anderson, now residing at the Louise Home, in the City of Washington, the sum of Twenty-five Dollars (\$25.) per year, which sum I direct to be paid to her by my Trustee on the twentieth day of each December, such payments to continue during the term of her natural life.

Eighth: To pay to my cousin, Alice K. Smith, the sum of Twenty-five Dollars (\$25.) per year, which sum I direct to be paid to her by my Trustee on the twentieth day of each December, such payments to continue during the term of her natural life.

Ninth: To pay to my cousin, Elizabeth H. Key, now

residing at the Episcopal Church Home, In Baltimore, Maryland, the sum of Twenty-five Dollars (\$25.) per year, which sum I direct to be paid to her by my Trustee on the twentieth day of each December, such payments to continue during the term of her natural life.

I also direct my Trustee to continue paying premiums on the life policy of said Elizabeth H. Key, in the Pension Bureau Beneficial Association. Upon the death of said Elizabeth H. Key, the Two Hundred and Fifty Dollars (\$250.) realized from such policy shall be applied first to paying her funeral expenses, and the balance, if any, shall be paid to her nearest next of kin, in equal shares if more than one.

Tenth: To pay to my cousin, Mary Taylor Key, so long as she remains unmarried, the sum of Fifty Dollars (\$50.) per year, one-half of which is to be paid in July and the other half in December of each year.

ITEM LX. I direct that if any of my cousins above mentioned, Mary Anderson, Alice K. Smith, Elizabeth H. Key or Mary Taylor Key shall survive the last survivor of my brothers and sisters, a sufficient amount of the rest and residue of my estate shall be held by my Trustee to produce the annual income above provided for my cousins, or any of them then surviving, and that such amount shall be set aside and held for such purpose until the death of the last survivor of my cousins, when the principal sum or sums so held shall be distributed in the manner hereinafter directed in respect to the remaining portion of the rest and residue of my estate.

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ITEM LXI. Should any income from my estate remain after payment of the bequests hereinbefore mentioned, such surplus income shall be invested and allowed to accumulate for a period of three years, when it shall be divided into two equal parts; one of such parts shall be distributed among my brothers and sisters mentioned as beneficiaries of the residuary portion of my estate, or their survivors, share and share alike; and the other portion shall be added to the corpus of my estate. This accumulation shall continue during consecutive periods of three years, and at the end of each period of three years, distribution shall be made in the manner above mentioned.

ITEM LXII. Upon the death of the last survivor of my four sisters, Ellen K. Messersmith, Elizabeth H. Turner, Janet M. Baldwin and Emily Virginia Cutts, and of my two brothers, Daniel Turner and Frank K. Turner, I direct my Trustee to convert my entire estate then remaining (with the exception of the parts, if any, to be set aside for my cousins) into cash, and divide the same equally among my nephews and nieces, Edward Turner Messersmith, Murray Baldwin, Richard M. Cutts, Daniel Turner, Junior, Anna Mace and Alice G. Cutts Myers. Should any of said nephews or nieces be then dead, the share which he, she or they would have received if living, shall be paid in equal shares to his, her or their children then living. Should such deceased nephews or nieces have died without issue, his, her or their share or shares shall be divided among the survivors, or their respective issue.

ITEM LXIII. I owe to my sister, Mrs. Emily Virginia

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cutts, the sum of Seven Thousand Dollars (\$7,000.), which I borrowed from her about one year ago, and on which I am paying her interest at the rate of six per cent (6%) per annum, payable in monthly instalments of Thirty-five Dollars (\$35.). I direct my Trustee to continue to borrow said sum at the same rate of interest so long as my sister may desire it.

ITEM LXIV. I desire that all of my funeral arrangements be as simple and inexpensive as is consistent with due regard to decency.

ITEM LXV. I desire that my Executor will allow no delay in the distribution of the monthly legacies to my brothers and sisters. My sister Mrs. Elizabeth H. Turner is entirely dependent upon what I have left to her as a monthly support, so there must be no delay in sending to her the One Hundred and Twenty-five Dollars.

The Thirty-five Dollars interest due each month to Mrs. Emily Virginia Cutts is also necessary for her support, and must be paid without any delay.

The other bequests are to be treated in the same way if possible, but the two above mentioned are very essential, and I urge my Executor to comply with this request and direction.

ITEM LXVI. Should the income from my estate be insufficient to pay the various legacies hereinbefore mentioned, I direct that all of the monthly payments be reduced a sufficient amount to permit the payment to my sister Elizabeth H. Turner, to remain One Hundred and Twenty-five Dollars, and I desire that in no event shall the payments to her be diminished to less than One Hundred Dollars (\$100.).

Miss Mary Browne

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ITEM LXVII. I authorize and empower my said Trustee at any time after my death when in the discretion of its proper officers it shall seem for the best interest of my estate so to do, or whenever it may be necessary in order to carry into effect the uses and trusts hereinbefore created and to make the division of my estate and property as herein directed, to sell any part or parts of the personal property or real estate of which I shall die seized and possessed, and in the event of any such sale or sales, to convey said personal property absolutely and said real estate in fee simple unto the purchaser or purchasers thereof, who shall not be required to see to or be responsible for the proper exercise of such discretion, or the due and proper application of the purchase money.

ITEM LXVIII. I nominate, constitute and appoint The National Safe Deposit, Savings and Trust Company of the District of Columbia Executor of this my last Will and Testament.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my seal to this my last Will and Testament, typewritten on twenty-two pages, the margin of each of which is signed by me for identification, on this day of August, A.D. 1903.

Alice Key Browne

Signed, sealed, published and declared by the within-named testatrix, ALICE KEY BROWNE, as and for her last Will and Testament, in the presence of us, who, at her request, in her presence and in the presence of one

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another, have hereunto subscribed our names as witnesses.

Names

Addresses.

pe 15-05 ✓	Chas C Landrum	Nat Life Ins Co Wash DC
pe 14-05 ✓	E. Ellison	1406 21 st St Wash DC
pe 14-05 ✓	W. H. Hoover	3038-14 th St NW " "

DISTRICT OF COLUMBIA, to wit:

I, THEODORE GOOSEWELL, Register of Wills for the District of Columbia, Clerk of the Probate Court,
Do hereby Certify, That the foregoing is a true copy of the original will _____
 _____ of Alice Key Browne, _____, deceased,
 and the proof thereof, filed and recorded in the office of the Register of Wills for the District of Columbia,
 Clerk of the Probate Court, aforesaid; and that the said will _____
 after having been duly proven, ~~as will appear by the proof thereto attached,~~ **was** _____ by order
 of the said Court, in accordance with the laws of the District of Columbia, admitted to probate and record
 on the 17th day of April, A. D. one thousand nine hundred
 and five.

I further Certify, That said will _____ **was** _____ duly executed
 and proved agreeably to the laws and usages of the District of Columbia, and that I have compared the
 foregoing copy of said will _____ and the proof
 thereof, with the original record in said office, and find it to be a full, true, and correct transcript thereof.

Witness, my hand and the seal of said Probate Court, this

25th day of April, A. D. 1934.

Theodore S. Goosewell

Register of Wills for the District of Columbia,
 Clerk of the Probate Court.

9-2787

32 *Answer of Defendants Murray Baldwin and David Cosgrave.*

Filed Apr. 17, 1934.

* * * * * *

Now come Murray Baldwin, individually, and David Cosgrave and Murray Baldwin as executors of the estate of Janet M. Baldwin, deceased, defendants above named, and for an answer to the bill of complaint filed in the above entitled cause, admit, deny, and aver as follows:

Defendants admit all of the allegations of fact contained in said bill, except, that for want of information these defendants do not admit that plaintiff, up to the present time, has discharged its duties as Trustee as required by said last will of Alice Key Browne, deceased, and deny that the other defendants, above named, desire that the whole of said income should be distributed in accordance with the provisions of items LXI and LXII, of said will.

Wherefore, the premises considered, these defendants consent to the granting of the prayer of said bill of complaint and pray that the Court will by its decree determine that these defendants as executors of the estate of Janet M. Baldwin, deceased, are entitled to receive from plaintiff the one-half of accumulated interest referred to in said complaint.

PETER F. SNYDER,
Attorney for Defendant-, Murray Baldwin, and David Cosgrave, as Executors of the Estate of Janet M. Baldwin, Deceased.

DISTRICT OF COLUMBIA, ss:

Being first duly sworn, deposes and says that he has read the foregoing answer and knows the contents thereof, that the same is true, except as to matters therein stated
33 on information and belief, and as to those matters he believes it to be true.

DAVID COSGRAVE,
Co-Executor of the Estate of Janet M. Baldwin, Deceased.

Subscribed and sworn to before me this 12th day of April, 1934.

[SEAL.]

MARY P. STONE,
Notary Public, District of Columbia.

Answer of Edward Turner Messersmith, Richard M. Cutts, Alice G. Cutts Myers, Daniel K. Turner, Jr., Anna Key Palmer (Formerly Known as Anna Mace), as Legatees, and Wells Fargo Bank & Union Trust Co., a Corporation, Assignee of Daniel K. Turner, Jr.

Filed Aug. 8, 1934.

* * * * *

Now come defendants Edward Turner Messersmith, Richard M. Cutts, Alice G. Cutts Myers, Daniel K. Turner, Jr., Anna Key Palmer (formerly known as Anna Mace), as legatees under the last will and testament of Alice Key Browne, and Wells Fargo Bank & Union Trust Co. (sued herein as Wells Fargo Bank & Union Trust Company), a corporation, as Trustee under an intervivos trust by way of assignment of one-half of the interest of Daniel K. Turner, Jr., and severally answering the bill of complaint of plaintiff herein, admit the necessity and propriety of having the questions, matters and things in controversy as set forth in said complaint judicially determined at this time and in this action.

Since the filing of the complaint herein the sum of One Thousand Dollars (\$1000.00) borrowed by defendant Daniel K. Turner, Jr., from defendant Wells Fargo Bank & Union Trust Co. has been repaid and therefore
34 said corporation is no longer entitled to the one-half interest by way of security in the share of Daniel K. Turner, Jr., as recited in paragraph eight of the complaint. The one-half interest in said Wells Fargo Bank & Union Trust Co., as trustee, by way of assignment, is valid and subsisting, however.

The defendants above named hereby submit to this Honorable Court and hereby give notice to all parties to this action that upon a hearing thereof said defendants will contend that the following is a true and just construction to be placed upon Items LXI and LXII of the last will of Alice Key Browne, to-wit:

1. The entire surplus income received and accumulated by the plaintiff trustee subsequent to April 17, 1932, the last triennial distribution date, and up to January 22, 1934, the date of the death of Janet M. Baldwin, the last survivor of the sisters and brothers of the testatrix, should be distributed to the defendants herein in accordance with the provisions of Items LXI and LXII of said last will, to-wit: one-sixth ($\frac{1}{6}$) of the entire surplus income received and accumulated subsequent to the last triennial distribution date each to Edward Turner Messersmith, Richard M. Cutts, Alice G. Cutts Myers, Anna Key Palmer (formerly known as Anna Mace), Murray Baldwin, five of the six legatees named in Item LXII of said last will and testament; one-half ($\frac{1}{2}$) of one-sixth ($\frac{1}{6}$) of the entire surplus income so received and accumulated to Daniel K. Turner, Jr. the sixth legatee named in said Item LXII, and one-half ($\frac{1}{2}$) of the one-sixth ($\frac{1}{6}$) interest to said Daniel K. Turner, Jr. to Wells Fargo Bank & Union Trust Co., a corporation, as assignee in trust under an indenture dated

September 6, 1911, whereby the said Daniel K. Turner, Jr. assigned to Wells Fargo Bank & Union Trust Co. an undivided one-half interest in all money or property to which the said Daniel K. Turner, Jr., might be entitled upon the termination of the trust created by the last will and testament of Alice Key Browne.

2. The estate of Janet M. Baldwin is entitled to no share whatsoever of said accumulated and undistributed income in the hands of the trustee at her decease.

3. The executors of the estate of Janet M. Baldwin are estopped to assert a construction other than that set forth in Paragraphs 1 and 2 hereof. Janet M. Baldwin during her lifetime received, participated and acquiesced in distributions of surplus income made to her after the prior decease of her brothers and sisters, Daniel Turner, Elizabeth H. Turner, Ellen K. Messersmith, Frank K. Turner, and Emily Virginia Cutts, all of whom died between triennial distribution dates, and at no time previous hereto has the estate of any of the above named deceased brothers or sisters participated in any distribution of income, but the entire one-half of said surplus income has at each distribution date been distributed to the then surviving brothers and sisters.

Wherefore, said defendants pray that:

(a) This Honorable Court instruct the plaintiff as such trustee as to the proper construction, application and execution of said trust provisions in the particulars in said Bill of Complaint set forth;

(b) This Honorable Court order such accounting as may be necessary or proper to make effective such instructions;

36 (c) This Honorable Court direct said trustee to pay one-sixth ($1/6$) of the entire surplus income received and accumulated subsequent to the last triennial distribution date, to-wit, April 17, 1932, each to Edward Turner Messersmith, Richard M. Cutts, Alice G. Cutts Myers, Anna Key Palmer (formerly known as Anna Mace) and Murray Baldwin; one-half ($1/2$) of one-sixth ($1/6$) of said surplus income to Daniel K. Turner, Jr., and the other one-half ($1/2$) of the one-sixth ($1/6$) interest of Daniel K. Turner, Jr. to Wells Fargo Bank & Union Trust Co., as trustee;

(d) And for such other and further relief as the nature of the case may require.

WALTER M. BASTIAN,
HELLER, EHRMAN, WHITE &
McAULIFFE,

*Attorneys for Defendants Edward Turner
Messersmith, Richard M. Cutts, Alice G.
Cutts Myers, Daniel K. Turner, Jr., Anna
Key Palmer, and Wells Fargo Bank &
Union Trust Co., a Corporation.*

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

R. J. Schrader, being first duly sworn, deposes and says: That he is an officer, to-wit: Trust Officer of Wells Fargo Bank & Union Trust Co., a corporation, one of the defendants named in the foregoing answer, and as such officer he is authorized for and on behalf of said corporation to make this verification; that he has read the foregoing answer and knows the contents thereof and that the same is true of his knowledge, except as to the matters therein stated on information or belief and as to those matters he believes the same to be true.

R. J. SCHRADER.

Subscribed and sworn to before me this 9th day of June, 1934.

[SEAL.]

DAISY CROTHERS WILSON,
*Notary Public in and for the City and
County of San Francisco, State of California.*

37

Opinion.

Filed Nov. 26, 1934.

* * * * *

I think that there should be no apportionment of the surplus income in the hands of the trustee and that no portion of it goes to the estate of Janet M. Baldwin.

BAILEY, J.

38

Order.

Filed Jan. 11, 1935.

* * * * *

Upon consideration of the motion of the plaintiff heretofore filed herein, it is, this 11th day of January, 1935,

Ordered, That Richard M. Cutts, Jr., and American Security and Trust Company, executors under the will of Richard M. Cutts, deceased, be, and they hereby are, made parties defendant in this cause in the place and stead of the said Richard M. Cutts, deceased, and that the answer heretofore filed herein by the said Richard M. Cutts, and the action heretofore taken by him herein shall stand as the action of said executors.

By the Court.

JENNINGS BAILEY,
Justice.

No objection.

PETER F. SNYDER,
*Attorneys for Defendants, Murray
Baldwin and David Cosgrave, Ex-
ecutors, and Murray Baldwin, In-
dividually.*

WALTER M. BASTIAN,
*Attorney for All Other Defendants,
and Richard M. Cutts, Jr., and
American Security and Trust Com-
pany, Executors.*

Request for Conclusions of Law.

Filed Jan. 11, 1935.

* * * * *

To Walter M. Bastian, Esquire, Attorney for certain Defendants. Minor, Gatley and Drury, Esquires, Attorneys for Plaintiff.

Please take notice that on the 6th day of December, 1934, we shall present to Mr. Justice Bailey requests for conclusions of law on behalf of the defendants, Murray Baldwin, individually, and Murray Baldwin and David Corgrave, executors of the estate of Janet M. Baldwin, deceased, in the form attached hereto.

PETER F. SNYDER,
GEORGE C. SHINN,
*Attorneys for Murray Baldwin,
Individually and Murray Baldwin
and David Corgrave, Executors.*

Received copy of the foregoing notice and attached form of conclusions of law this 5th day of December, 1934.

WALTER M. BASTIAN,
Attorney for Certain Defendants.
MINOR, GATLEY & DRURY,
By ARTHUR P. DRURY,
Attorneys for Plaintiff.

* * * * *

Now come the defendants, Murray Baldwin, individually, and Murray Baldwin and David Cosgrave as executors of the estate of Janet M. Baldwin, deceased, and ask the Court to make and render the following conclusions of law:

1. The Court holds as a matter of law from the evidence that under the true and proper construction and interpretation of the terms and provisions of the last will
40 and testament of Alice Key Browne, deceased, dated the 8th day of August 1903, the surplus income accumulated in the hands of the National Savings and Trust Company, as trustee, pursuant to Item LXI thereof, consti-

tuted, as to one-half thereof, a joint fund for the benefit of the sisters and brothers of the said Alice Key Browne and their survivors.

2. The Court holds as a matter of law from the evidence that under the true and proper construction and interpretation of the terms and provisions of the last will and testament of Alice Key Browne, deceased, dated the 8th day of August, 1903, the surplus income accumulated in the hands of the National Savings and Trust Company, as trustee, pursuant to Item LXI thereof, constituted, as to one-half thereof, a vested estate in the sisters and brothers of said Alice Key Browne, deceased.

3. The Court holds as a matter of law from the evidence that under the true and proper construction and interpretation of the terms and provisions of the last will and testament of Alice Key Browne, deceased, dated the 8th day of August, 1903, the surplus income accumulated in the hands of the National Savings and Trust Company, as trustee, pursuant to Item LXI thereof, to the extent of one-half thereof, which accrued from the date of the last triennial distribution of said funds on the 17th day of April, 1932, to the date of the death of Janet M. Baldwin on January 22, 1934, should be paid over by said National Savings and Trust Company, as trustee, to the defendants, Murray Baldwin and David Cosgrave, executors of the estate of Janet M. Baldwin, deceased.

41 To the refusal of the Court to grant and make the foregoing conclusions of law, the defendants, Murray Baldwin, individually and Murray Baldwin and David Cosgrave, executors of the estate of Janet M. Baldwin, deceased, note an exception.

_____,
Justice.

Decree Construing Will.

Filed Jan. 11, 1935.

* * * * *

This cause coming on to be heard on the bill of complaint and the answers of the various defendants thereto, and the same having been fully argued by the respective parties and duly considered by the court, together with such evidence as was produced in support thereof, and the court

being of opinion that, under the true and proper construction and interpretation of the terms and provisions of the last will and testament of Alice Key Browne, deceased, dated the 8th day of August, 1903, the surplus income accumulated in the hands of the National Savings and Trust Company, as trustee, pursuant to Item LXI, hereof, should not be apportioned upon the death of Janet M. Baldwin, the last survivor of the brothers and sisters of said testatrix named in said will, and that the estate of said Janet M. Baldwin is not entitled to share therein, but that the whole of the same should be by said trustee distributed as provided in Item LXII of said last will and testament, it is, by the Court, this 11th day of January, 1935,

Adjudged, ordered and decreed, That the said National Savings and Trust Company, as trustee under the
42 last will and testament of said Alice Key Browne, deceased, be, and it hereby is, directed to distribute the whole of the surplus income accrued under Item LXI of said last will and testament since the 17th day of April, 1932, the date of the last triennial account of said trustee, to the nephews and nieces named by said decedent and in the manner designated by Item LXII of said last will and testament. And it is further

Adjudged, ordered and decreed, that said trustee be, and it hereby is, authorized and directed to pay to Messrs. Minor, Gatley & Drury, the sum of Three Hundred Dollars (\$300.00) out of said accumulated income for their services rendered herein.

By the Court:

JENNINGS BAILEY,
Justice.

The defendant Murray Baldwin, individually, and Murray Baldwin and David Cosgrave, executors of the Estate of Janet M. Baldwin, deceased, except to the entry of the foregoing decree and note an appeal to the Court of Appeals, which is hereby allowed, and the bond for costs on such appeal is hereby fixed at \$100, or a cash deposit of \$50 in lieu thereof.

JENNINGS BAILEY,
Justice.

Memorandum.

January 29, 1935.—Bond for costs on appeal, \$100.00, approved and filed.

43

Assignment of Errors.

Filed Mar. 13, 1935.

* * * * *

Come now the Appellants, Murray Baldwin, individually, and David Cosgrave and Murray Baldwin as Executors of the Estate of Janet M. Baldwin, deceased, in the above entitled cause, and respectfully submit that in the record, proceedings, decision and order of the Supreme Court of the District of Columbia in the above entitled cause, there is manifest error in this, to wit:

(1) The Supreme Court of the District of Columbia erred in the construction and interpretation placed by it upon Items 61 and 62 of the last will and testament of Alice Key Browne, dated the 8th day of August, 1903, as set forth in its Decree construing said will.

(2) That said Court erred in its decree construing said will by its ruling that the surplus income accumulated in the hands of the National Savings and Trust Company, as Trustee, pursuant to Item 61 of said will of Alice Key Browne dated August 8, 1903, should not be apportioned upon the death of Janet M. Baldwin, the last survivor of the brothers and sisters of said testatrix named in said will.

(3) That said Court erred in its ruling and Decree by holding that the Estate of Janet M. Baldwin is not entitled to share in an apportionment of surplus income accumulated in the hands of said Trustee in pursuance of the terms of Item 61 of said will.

(4) That said Court erred in its ruling and Decree by holding that the whole of the accumulated surplus
44 income at the time of the death of said Janet M. Baldwin should be distributed as provided in Item 62 of said will.

(5) That said Court erred by its ruling and Decree in holding that the Estate of said Janet M. Baldwin was not

entitled to an equal one-half portion of said surplus income accumulated in the hands of said Trustee at the time of death of Janet M. Baldwin.

(6) That said Court erred in denying to said Janet M. Baldwin and to the Estate of Janet M. Baldwin, the existence of a vested right in an equal one-half portion of said surplus income accumulated in the hands of said Trustee at the time of death of Janet M. Baldwin.

(7) That said Court erred in its ruling and Decree by directing said Trustee to distribute the whole of the surplus income accrued under Item 61 of said will since April 17, 1932, to the nephews and nieces of Alice Key Browne named in and by Item 62 of her said will.

(8) That said Court erred in its ruling and Decree by denying to the Estate of Janet M. Baldwin the distribution by said Trustee to said Estate of an equal one-half of surplus income accruing in the hands of said Trustee since April 17, 1932, and to the date of death of said Janet M. Baldwin.

Wherefore, appellant prays that the orders, decrees and decisions of the said Supreme Court of the District of Columbia made and entered in this cause be reversed and judgment rendered in favor of appellant and for costs.

RAYMOND BENJAMIN,
*Attorney for Appellants, Murray Baldwin,
Individually; Murray Baldwin and David
Cosgrave as Executors of the Estate of
Janet M. Baldwin, Deceased.*

HAMEL, PARK & SAUNDERS,
Of Counsel.

Filed Mar. 20, 1935.

* * * * *

It is hereby agreed that the following facts were stipulated as true at the hearing of this cause:

Alice Key Browne died on March 21, 1905, and the copy of will attached to the Bill of Complaint as "Exhibit A"

is a true copy of the last will and testament of said Alice Key Browne.

The brothers and sisters of Alice Key Browne are all dead, the dates of their death being as follows:

Ellen Messersmith, May 23, 1907.
Daniel Turner, January 14, 1908.
Frank K. Turner, January 2, 1916.
Emily Cutts, December 10, 1918.
Elizabeth Turner, February 10, 1924.
Janet M. Baldwin, January 22, 1934.

The first triennial distribution under the terms of Item LXI of said will was made on June 27, 1908, the only beneficiaries and the amounts paid them being as follows:

Elizabeth H. Turner, \$675.03
Frank Key Turner, \$675.03
Janet M. Baldwin, \$675.03
Emily V. Cutts, \$675.03

The next triennial distribution was April 19, 1911, the only beneficiaries and the amounts paid them being as follows:

Elizabeth H. Turner, \$2,028.64
Frank Key Turner, \$2,028.64
Janet M. Baldwin, \$2,028.64
Emily V. Cutts, \$2,028.65

46 The next triennial distribution was April 20, 1914, the only beneficiaries and the amounts paid them being as follows:

Elizabeth H. Turner, \$2,794.25
Frank Key Turner, \$2,794.25
Janet M. Baldwin, \$2,794.24
Emily V. Cutts, \$2,794.24

The next triennial distribution was April 18, 1917, the only beneficiaries and the amounts paid them being as follows:

Elizabeth H. Turner, \$3,857.23
Janet M. Baldwin, \$3,857.23
Emily V. Cutts, \$3,857.23

The next triennial distribution was April 17, 1920, the only beneficiaries and the amounts paid them being as follows:

Elizabeth H. Turner, \$7,449.44

Janet M. Baldwin \$7,449.44

The next triennial distribution was April 17, 1923, the only beneficiaries and the amounts paid them being as follows:

Elizabeth H. Turner, \$8,451.32

Janet M. Baldwin, \$8,451.32

The next triennial distribution was April 26, 1926, the sole beneficiary being Janet M. Baldwin, and the amount paid her being \$22,652.48.

The next triennial distribution was April 17, 1929, the sole beneficiary being Janet M. Baldwin, and the amount paid her being \$26,149.06.

47 The final triennial distribution was April 17, 1932, the sole beneficiary being Janet M. Baldwin and the amount paid her being \$27,628.43.

It is further stipulated that all the cousins referred to in the will are now deceased.

MINOR, GATLEY & DRURY,
By ARTHUR P. DRURY,
*Attorneys for National Savings
and Trust Company, Plaintiff.*
WALTER M. BASTIAN,

Attorney for Edward Turner Messersmith, Richard N. Cutts, Alice G. Cutts Myers, Daniel K. Turner, Jr., Anna Key Palmer, Wells Fargo Bank and Union Trust Company, a Corporation, Assignee of Daniel K. Turner, Jr.

RAYMOND BENJAMIN,
Attorney for Murray Baldwin, Individually; David Cosgrave, Executor of the Estate of Janet M. Baldwin, Deceased, and Murray Baldwin, Executor of the Estate of Janet M. Baldwin, Deceased, Defendants.

Agreed Designation of Record.

Filed Mar. 20, 1935.

* * * * *

The Clerk will please prepare transcript of record in the above entitled cause to be filed in the Court of Appeals of the District of Columbia, including the following:

1. Bill for construction of will.
2. Answer of Defendants Murray Baldwin and David Cosgrave.
- 48 3. Answer of Defendants Edward Turner Messersmith et al.
4. Request for conclusions of law.
5. Decree construing the will.
6. Memo: Appeal Bond filed and approved.
7. Statement of Evidence.
8. Assignment of Errors.
9. This designation.

MINOR, GATLEY & DRURY,
By ARTHUR P. DRURY,

*Attorneys for National Savings
and Trust Company, Plaintiff.*

WALTER M. BASTIAN,

Attorney for Edward Turner Messersmith, Richard N. Cutts, Alice G. Cutts Myers, Daniel K. Turner, Jr., Anna Key Palmer, Wells Fargo Bank and Union Trust Company, a Corporation, Assignee of Daniel K. Turner, Jr.

RAYMOND BENJAMIN,

Attorney for Murray Baldwin, Individually; David Cosgrave, Executor of the Estate of Janet M. Baldwin, Deceased, and Murray Baldwin, Executor of the Estate of Janet M. Baldwin, Deceased, Defendants.

49 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing

pages numbered from 1 to 48, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 56951 in Equity, wherein National Savings and Trust Company, a corporation, Trustee under the last will and testament of Alice Key Browne, deceased, is Plaintiff, and Edward Turner Messersmith et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 4th day of April, 1935.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6454. Murray Baldwin, Individually, and Murray Baldwin and David Cosgrave, Executors &c., Appellants, vs. National Savings and Trust Company, a Corporation, Trustee &c. United States Court of Appeals for the District of Columbia. Filed Apr. 9, 1935. Henry W. Hodges, Clerk.

(6272-C)

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 6454.

MURRAY BALDWIN, INDIVIDUALLY, and MURRAY BALDWIN
and DAVID COSGRAVE, executors of the estate of
JANET BALDWIN, deceased, *Appellants*,

v.

NATIONAL SAVINGS AND TRUST COMPANY, a corporation,
trustee under the last will and testament of ALICE
KEY BROWNE, deceased, *Appellee*.

APPELLANTS' OPENING BRIEF.

CHARLES D. HAMEL,
RAYMOND BENJAMIN,
Attorneys for Appellants.

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COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 6454.

MURRAY BALDWIN, INDIVIDUALLY, and MURRAY BALDWIN
and DAVID COSGRAVE, executors of the estate of
JANET BALDWIN, deceased, *Appellants*,

v.

NATIONAL SAVINGS AND TRUST COMPANY, a corporation,
trustee under the last will and testament of ALICE
KEY BROWNE, deceased, *Appellee*.

APPELLANTS' OPENING BRIEF.

STATEMENT OF FACTS.

This is a suit in equity of the National Savings and Trust Company, a corporation, hereinafter referred to as the "Trust Company", as trustee under the last will and testament of Alice Key Browne, deceased, against the nephews and nieces of Alice Key Browne, deceased, and against Murray Baldwin and David Cosgrave, executors of the last will of Janet M. Baldwin, a deceased sister of said decedent. Alice Key Browne

died in the year 1905 and the plaintiff trust company has ever since been acting as trustee under her said last will and testament. In the bill of complaint the plaintiff trust company asks for a construction of the will of the said decedent Alice Key Browne in order to adjust by a decree of court the controversy between certain beneficiaries named in said will respecting the distribution of a portion of the accumulated income of the estate of said decedent.

The provisions of the will which give rise to the controversy are designated therein as items LXI and LXII. These two items read as follows:

“Item LXI. Should any income from my estate remain after payment of the bequests hereinbefore mentioned, such surplus income shall be invested and allowed to accumulate for a period of three years, *when it shall be divided into two equal parts; one of such parts shall be distributed among my brothers and sisters mentioned as beneficiaries of the residuary portion of my estate, or their survivors, share and share alike; and the other portion shall be added to the corpus of my estate.* This accumulation shall continue during consecutive periods of three years, and at the end of each period of three years, distribution shall be made in the manner above mentioned.

“Item LXII. Upon the death of the last survivor of my four sisters, Ellen K. Messersmith, Elizabeth H. Turner, Janet M. Baldwin and Emily Virginia Cutts, and of my two brothers, Daniel K. Turner and Frank K. Turner, *I direct my trustee to convert my entire estate then remaining (with the exception of the parts, if any, to be set aside for my cousins) into cash, and divide the same equally among my nephews and nieces, Edward Turner Messersmith, Murray Baldwin, Richard M. Cutts, Daniel Turner, Junior, Anna Mace and*

Alice G. Cutts Myers. Should any of said nephews or nieces be then dead, the share which he, she or they would have received if living, shall be paid in equal shares to his, her or their children then living. Should such deceased nephews or nieces have died without issue, his, her or their share or shares shall be divided among the survivors, or their respective issue." (pp. 4 and 27 transcript)

The brothers and sisters referred to in Item LXI were four sisters and two brothers. According to item LXI the earnings or accretions of the estate of the decedent termed by her "surplus income" were to be distributed one-half to the corpus of the estate and the remaining one-half to be divided as set forth in said Item LXI, that is to say, to be accumulated during periods of three years, when payment thereof was to be made to the decedent's four sisters and two brothers, or the survivors thereof, share and share alike. Janet M. Baldwin was the last survivor of these four sisters and two brothers. She died on January 22nd, 1934. The last three-year payment period provided for in Item LXI occurred on April 18th, 1932. Between the last mentioned date, April 18th, 1932, and the date of the death of Janet M. Baldwin on January 22nd, 1934, there had accrued as said one-half of said income the sum of \$13,589.80. During this last mentioned period Janet M. Baldwin was the sole survivor of the said four sisters and two brothers. After the death of Janet M. Baldwin the appellants Murray Baldwin and David Cosgrave, as executors of the last will of Janet M. Baldwin, notified the plaintiff that it was their contention that Janet M. Baldwin had a vested interest in the said one-half of the surplus income accumulated from the date of the last distribu-

tion thereof on April 18th, 1932, to the date of the death of Janet M. Baldwin, January 22nd, 1934, and that by reason thereof the estate of Janet M. Baldwin was entitled to receive from the plaintiff, the trust company, said one-half of said accumulated income up to her death amounting to said sum of \$13,589.80. Thereafter the other defendants other than Murray Baldwin and David Cosgrave notified the trust company that they claimed that Janet M. Baldwin did not have a vested interest in said income accumulated from the last triennial distribution to the date of the death of Janet M. Baldwin, but that the whole of said accumulated income should be distributed to the nieces and nephews of said decedent in accordance with the provisions of item LXII of said will of said decedent. These conflicting claims form the controversy which is the subject of this suit. On the 11th day of January, 1935, the Supreme Court of the District of Columbia entered a decree directing the trust company as trustee under said will of said decedent to distribute the whole of the surplus income, including the one-half in controversy, accrued from the date of the last triennial account of the trustee to the nephews and nieces of the said decedent and not to the appellants, the executors of the last will of the said Janet M. Baldwin. To this decree of the said Supreme Court the said appellants Murray Baldwin, individually, and Murray Baldwin and David Cosgrave, as executors of the last will of Janet M. Baldwin, deceased, took exception, and the present appeal is from the said decree.

Points Involved.

In order to hold that the estate of Janet M. Baldwin is not entitled to the one-half of the accumulated income from the date of the last triennial payment to the time of her death, which is the amount in dispute and the subject of this action, it is necessary for the court to reach the conclusion that the brothers and sisters named in item LXI, or the survivor of them, have no vested interest in the income accumulating during the triennial period, and that the accumulated income, as it accumulated, became part of the corpus of the estate and could not be severed therefrom except upon each triennial period. These must have been the conclusions upon which the ruling of the court was predicated.

If, on the other hand, the accumulating one-half of the income during each triennial period never became a part of the corpus of the estate, but the beneficial title thereto vested immediately upon the acquisition thereof in the brothers and sisters then surviving, the part accumulated since the last triennial payment up to the death of Janet Baldwin not being a part of the corpus of the estate did not pass to the nephews and nieces, but belonged to the estate of Janet Baldwin the last survivor of the brothers and sisters. Thus a decision of this case depends upon whether or not the accumulating one-half of the income provided to be paid to the brothers and sisters during their lives was part of the corpus of the estate until each triennial period or never became part of that corpus but was a separate estate in which the brothers and sisters, and their survivor Janet Baldwin had a vested interest. If the one-half of this accumulating fund never became

a part of the corpus, then the beneficial interest as it accumulated vested in the brothers and sisters, or their survivor. This is particularly so here because there is no provision in the will creating any remainder interest in this accumulating fund in the nephews and nieces, or limiting or restricting in any way the beneficial interest of the surviving sister Janet Baldwin in it. There is nothing in the will which can be construed as a limitation over to the nieces and nephews of a remainder interest in this accumulated one-half after the death of the last surviving brother or sister.

An examination of the will and of the rules of law applicable thereto conclusively demonstrates that the accumulating one-half of the income never became part of the corpus of Alice Key Brown's estate; that Janet Baldwin the only survivor of the brothers and sisters from the last triennial payment up to her death had a vested interest in the accumulation during this period; that there was no limitation to this vested interest and no remainder over to any one provided for in the will and that upon her death her vested interest did not pass back into the corpus of the Alice Key Brown estate, but passed to Janet Baldwin's estate. The will and the principles of law compel these conclusions and absolutely demonstrate that the judgment of the lower court was incorrect.

The Accumulating One-half Never Became Part of the Corpus of Alice Key Brown's Estate and There Was no Remainder Over Therein Limited to the Nieces and Nephews.

A reading of the will clearly indicates that the accumulating one-half of the fund never became part of the corpus of the estate of Alice Key Brown so as to

pass to her nephews and nieces upon the death of the last survivor of her brothers and sisters. Item LXI says the surplus income shall be divided into two equal parts, Part I to go to her brothers and sisters, or their survivor, Part II to be added to the corpus of the estate. Part II in the words of the will says "*and the other portion shall be added to the corpus of my estate.*" Particular attention is called to these words. The testatrix does not say that Part I which was to go to the brothers and sisters, or their survivor, shall be added to the corpus of the estate. She says emphatically that the *other portion in which they were not to share was to be added to the corpus of her estate.* These words show beyond a doubt (1) that this accumulation while accumulating during the triennial periods was not to be deemed part of her estate, and (2) that the one-half given to the brothers and sisters, or their survivor, was never to be considered part of the corpus. If, while the fund was accumulating during each of said triennial periods, it was part of the corpus, *then it would not have been necessary to provide that ONE-HALF should be added to the corpus.* If, as appellees contend, the accumulations during the triennial period were part of the corpus, *the explicit instructions that ONE-HALF thereof should be added to the corpus are idle words and have no meaning* because the accumulated fund was at all times part of the corpus. If the accumulating fund was at all times part of the corpus it was unnecessary to say that one-half thereof every three years should be added to the corpus. On the other hand, if the accumulating fund was not deemed a part of the corpus by the testatrix, but was considered by her as a separate fund one-half of which she had given to her brothers and sisters, or

their survivor, it was necessary to provide what should become of the other one-half, and accordingly she did so by stating it should "*be added to the corpus.*" This consideration indicates beyond a doubt that the one-half given to the brothers and sisters never was a part of the corpus of the estate and never became part thereof.

The fact that the testatrix states that one-half of the accumulated fund was to be added every three years to the corpus indicates conclusively that the other one-half never was and never would be part of the corpus of her estate. That other one-half was to go to the brothers and sisters of the testatrix, or the survivor of them. There is no statement that the one-half given to the brothers or sisters, or the survivor of them, or any portion thereof was ever to become part of the corpus of the estate. On the contrary, provision that one part was to be added to the corpus every three years excludes the idea that the remaining part which was given to the brothers and sisters was at any time part of or to become part of the corpus of the estate. The will neither expressly, nor by implication states that the part given to the brothers and sisters should ever become part of the corpus, or be added to the corpus, and the fact that it clearly states that the other part not given to the brothers and sisters was to be added to the corpus expressly and by the clearest implication indicates that the part given to the brothers and sisters was not to be deemed at any time part of the estate of the testatrix.

The provisions of Item LXI of this will dividing the "surplus income" into two parts and providing that one part shall go to the brothers and sisters, or their survivor, and that the other part shall be added every

three years to the corpus indicates moreover that this accumulating fund which was given to the brothers and sisters was lifted out of the body of the corpus and entirely segregated therefrom. This fund was designed to provide a consumable fund for the sustenance of the brothers and sisters, or the survivor of them, and was clearly severed from the estate of the testatrix. By this provision she created a separate and distinct fund lifted from the corpus and entirely foreign thereto. This fund came from "surplus income" earned on the corpus. When earned it was cut off from the corpus and given a separate entity. The only relation the fund under Item LXI had to the corpus was that it owned a lien on the surplus earnings.

Alice Key Browne, the testatrix, was a woman of recognizable acumen. Every line in her will recites a clear purpose, namely: to so conserve her estate that it would possess the ability to provide for those who were to be the objects of her bounty.

She had a clear conception of the underlying principle of successful economics; that money put to work has a cumulative earning power, whereas if distributed immediately upon its receipt, the earning power of the collective sum is destroyed.

Ten or twenty thousand dollars is in better position to buy a profitable investment than five hundred or a thousand dollars. This was evidently in the mind of Alice Key Browne. A reading of the will is most convincing proof of this fact. Particularly, when it is borne in mind that in 1903, at the time the Will was executed, stocks and bonds were not as available to the small investor as has become true since the war days of 1918; it required substantial sums to purchase desirable securities.

Thus it was that the testatrix directed the trust company to accumulate earnings which as a total would have a favorable buying power and earning ability, whereas divided, it would be Peter's Pence.

Item LXI provides: "*such surplus income shall be invested and allowed to accumulate for a period of three years, WHEN it shall be divided into two equal parts * * **" One part to a class and/or its survivor; the other part to "be added to the corpus of the estate."

The one-half part that was accumulated for the benefit of sisters and brothers, we respectfully urge, was an estate created separate and apart from the corpus. It was at all times without relation to the corpus, nor was it ever contemplated that it should at any time be mingled with the corpus.

Such part of the accumulated earnings, as the testatrix desired should be mingled with the corpus and become and remain a part thereof, was specifically bequeathed to the corpus.

The one-half part that was segregated from the corpus became a distinct fund wholly foreign to the corpus, and thereupon the product was severed from its source and a separate estate was created in the product to which there is no remainder.

The estate of Janet M. Baldwin, deceased, stands in the same position as Mrs. Baldwin during her lifetime, and Janet M. Baldwin during her lifetime as sole survivor of her class owned an estate that may be definitely named as the *one-half of all EARNINGS accumulated under item LXI* of the will of the testatrix. This estate was her property in which there was no interest other than her own. It lived co-existent with her life time and upon her death passed to her estate.

The One-Half of Accumulations not Returned to the Corpus was a Separate Estate in Which There Was no Remainder Over to the Nephews and Nieces.

From the foregoing discussion it is conclusively established that one-half of this accumulating fund never became part of the corpus of the estate of the decedent, but was lifted from the corpus, set apart and constituted a fund entirely foreign to the corpus. This fund by the terms of the will was to go to the brothers and sisters, or their survivor.

As we will hereafter show the brothers and sisters of the testatrix, or the survivor of them, had a vested interest in this fund. This vested interest is not limited or restricted in any way, nor is it subject to any contingency creating a remainder over to some one else. There are no conditions to the gift of this one-half of the accumulations to the brothers and sisters, or the survivor. No provision is made for the lapse of this gift in the event that the surviving brother or sister should die during one of the triennial periods. There is no provision that this fund in which they had a vested interest should go to the nephews and nieces in the event of the death of the last surviving brother and sister during a triennial period. There is no provision that if this survivor should die during a period of accumulation that her interest therein up to the date of accumulation was extinguished or would lapse. There is no provision that the interest of the survivor therein should go back into the corpus. The fact that the other one-half should go into the corpus indicates a contrary intent and indicates that the one-half in which the surviving brother or sister had a vested in-

terest should not go back into the corpus of the estate. There is no mention made of secondary takers of the fund set apart to the brothers and sisters, or the survivor of them. There is no suggestion that this fund, or any part thereof, should pass to any remaindermen. In short, the will is silent with respect to limiting or restricting the vested interest of the survivor of the brothers and sisters in this fund and with respect to creating a remainder over therein upon the death of such surviving brother or sister. If an interest in this separate fund did not vest in the brothers or sisters, or the survivor, but became part of the corpus of the estate the will would have said so. If that interest was to be extinguished by the death of the surviving brother or sister during the triennial period it would have so provided. If that interest was to lapse by such a death it would have so stated. If the interest was not to vest in the brothers or sisters, or the survivor of them, except at the end of each three-year period it would have so stated. If the interest in one-half of this accumulating fund was subject to the condition that in order to get it the brother or sister must be alive and live out the full triennial period, it would have so stated, and it would have provided for a secondary taker or remainderman in that case, and would not have left the whole matter unmentioned and in the air. Alice Key Browne knew that a day would come when only one brother or sister would be a last survivor to take this fund. She made no stipulation that such last survivor must remain alive until the termination of the last day of the last triennial period. It would reduce the law to an absurdity to say that Alice Key Browne intended by her will that her last surviving brother or sister should receive the one-half accu-

culated income specially set aside for him or her *only* if he or she lived to the exact last minute of the last day of the third year of the last triennial period.

If we conclude that the surviving brothers or sisters, or the survivor of them, had a vested interest in this accumulation subject to enjoyment in the future, then the will is complete and there was no necessity of including the provisions, the absence of which has been referred to. But if the conclusion is that they had no such vested interest then the will is incomplete and leaves the beneficial ownership of one-half the accumulated income unvested, undisposed of and unprovided for. The construction that one-half of this accumulating fund was a fund set apart from the corpus of the trust in which the brothers and sisters, or the survivor of them had a vested interest as it accumulated, and it did not become at any time a corpus of the estate and pass to the remaindermen, but vested in the survivor of the brothers and sisters, and passed to her heirs, makes the will an intelligible and complete instrument. The construction that this accumulating one-half became part of the corpus of the estate when the will says it did not, and that the beneficial ownership of it did not vest in any one during the period of accumulation makes the will incomplete, unintelligible and makes one clause conflict with the others.

Item LXII of the will bears out the foregoing conclusions. Item LXI provides the surplus income shall be divided into two equal parts, one to be distributed to the brothers and sisters, and the other "to be added to the corpus of my estate." Item LXII states that upon the death of the last survivor of her brothers and sisters the trustee is to convert the entire estate then remaining into cash and divide it among the

nephews and nieces. Construing items LXI and LXII together it is clear that the direction to distribute to the nephews and nieces refers to the *corpus* of the estate of the decedent and not to the one-half of the accumulating funds which had been severed from the estate and given to the brothers and sisters, or the survivor of them. One-half of this accumulating fund was to be added to the corpus of her estate. This automatically severed the other one-half from the corpus of her estate. The next provision of the will says that the corpus of her estate is to be distributed to the nephews and nieces upon the death of the last surviving brother or sister. Thus we see that no provision is made for the separate fund which she had severed from her estate and given to her brothers and sisters. The reason that no such provision is made is clear. The surviving sister had a vested interest in that particular fund and upon her death it passed to her heirs or devisees. If the testatrix had desired that upon the death of the surviving brother or sister his or her interest in this accumulating one-half of the fund should also go back into the corpus of her estate and be distributed to the nephews and nieces the will would have said so. In failing to create a remainder over to the nephews and nieces in this fund the testatrix clearly indicates that she considered that this fund was not part of her estate but belonged to the surviving brother or sister, and would in the ordinary course pass to the heirs or devisees of that surviving brother or sister. In short, by item LXI she severs the accumulating fund from her estate and then provides that one-half thereof shall be added to her estate and by item LXII upon the death of the last surviving brother or sister she gives her estate, including the

one-half of the accumulating fund provided to be added to the corpus to her nephews and nieces, leaving the other one-half vested in the last surviving sister to pass to the sister's heirs or devisees by operation of law. The provisions of item LXII giving the corpus of the estate to the nephews and nieces upon the death of the last surviving brother or sister had no reference to the one-half of the accumulating fund which had been severed from the corpus and which by the clearest implication of the will was never to be added to the corpus. This one-half not having been added to the corpus did not pass by the terms of item LXII to the nephews and nieces, but having already vested in Janet M. Baldwin, was part of her estate and passed to her heirs or devisees.

One-Half of the Accumulating Fund was a Separate Estate Vested in Janet Baldwin in Which There was no Remainder.

A vested estate has been defined as follows:

“A vested estate * * * exists when there is an immediate right of present enjoyment *or a present fixed right of future enjoyment* in an ascertained person.” (Italics ours)

69 C. J. 1669.

The Code of the District of Columbia, Title 25, ch. 8, Sec. 272, states the general rule on the subject of vested and contingent interests. It says:

“A future estate is vested when there is a person in being who would have an immediate right to the possession of the land upon the expiration of the intermediate or precedent estate, or upon the arrival of a certain period or event when it

is to commence in possession. It is contingent when the person to whom or the event upon which it is limited to take effect in possession or become a vested estate is uncertain.”

For the distinction between vested and contingent remainders see *Green v. Gordon*, 38 App. D. C. 443, where the court held, in effect, that estates will be held to vest *at the earliest possible moment*; that conditions are considered as subsequent rather than precedent, and that adverbs of time as “where”, “there”, “after”, “from”, etc., in a devise of a remainder are construed to relate merely to the time of the enjoyment of the estate and not to the time of the vesting in interest.

To say that the language of the item LXI of the will is written in contemplation of a contingency that surplus income might or might not be available for distribution, and that the terminology thereof renders the bequest contingent, is directly to transpose the purport of the matter, to confuse terms, or to use words in other than their legal sense. A contingency, in the law of estates, is not a matter touching the origin of a fund or property, but an event or circumstance upon which its distribution or devolution depends. The term “contingency” connotes a burden not upon the source of the gift, but upon its destination or objective. The condition precedent with which a contingency must be pregnant is not a condition operating upon the title or estate of the donor. Instead, it is a condition limiting or affecting the title or estate of the donee. A contingent estate, therefore, is not the estate of the giver, but the taker.

In this case, if we say that the testatrix contemplated

a given circumstance, *i. e.*, the accumulation of surplus income to arise during the continuance of the trust, we may upon cursory examination of the matter consider such circumstance as a "contingency", but in legal contemplation it cannot mean the creation of a contingent estate in the beneficiaries, for the reason that the testatrix has given all and everything, upon no condition whatsoever. The spring of her beneficence is emptied absolutely. The fact that she undertook to and did control its flow, so that it issued at stated intervals, affects the matter not at all when it is perceived that she withheld nothing, and made the title to her beneficiaries dependent upon nothing and enjoyment only upon the mere efflux of time. Had she conditioned the gift of her bounty upon an event to occur or to fail to occur, upon an act to be done or to be left undone, upon a requirement to be met, or a discretion to be exercised, then a contingent estate would have been created. Instead, she gave, completely and without restraint. She divested herself and her trustee entirely. By so doing she invested her beneficiaries. Thus she created, as she intended to create, a vested estate.

In the construction of wills the paramount rule is to give effect to the intention of the testator, if it does not run counter to some positive rule of law.

Carr v. Washington & Old Dominion Ry., 44 App. D. C. 533; 44 W. L. R. 162.

It is a fundamental rule of construction that all parts of a will must be considered for the purpose of arriving at the intention of a testator, and when the intention is found it must prevail if not contrary to law.

Wells v. Brown (S. C. D. C.), 44 W. L. R. 214.

“*Estates will be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary.*” (Italics ours)

Doe ex dem. Poor v. Considine, 6 Wall. 458;
Green v. Gordon, 38 App. D. C. page 443;
Richardson v. Pennicks, 1 App. D. C. 261.

Another case recognizing the character of a legacy as vested rather than contingent is *Hauptman v. Carpenter*, 16 App. D. C. 524. See also: *Johnson v. Washington Loan & Trust Co.*, 33 App. D. C. 242, in which the rules of construction are discussed.

“* * * Estates, legal or *equitable*, given by will should *always be regarded as vesting immediately*, unless the testator has by very clear words manifested an intention that they should be contingent upon a future event.” (Italics ours)

McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. Rep. 652.

In *Wills v. Maddox*, 45 Appeal Cases, 128-135, the court said:

“* * * the rule by which courts are always guided; namely, that estates ‘shall be held to vest at the earliest possible period unless there shall be a clear manifestation of the intention of the testator to the contrary.’ *Doe ex dem. Poor v. Considine*, 6 Wall. 458, 18 Law ed. 869; *McArthur v. Scott*, 113 U. S. 340, 378.”

Under Title 25, ch. 18, sec. 481 of the Code, or the Statute of Uses, an estate must vest.

See *Bond v. Grimm*, 34 W. L. R. 724.

“In legacies, as in devises, wherever testator’s language is ambiguous, or obscure, or doubtful, a construction is preferred which will make a legacy vested rather than contingent, or, if contingent, will make it vested as soon as possible.”

Page on Wills, Sec. 1121, citing

Bethea v. Bethea, 116 Ala. 265; 22 So. 561;

Hills v. Barnard, 152 Mass. 67, 25 N. E. 96;

Deacon v. St. L. U. Trust Co., 271 Mo. 669; 197 S. W. 261;

R. I. Hosp. Tr. Co. v. Noyes, 26 R. I. 323; 58 Atl. 999.

“It has often been said that the law favors the vesting of estates, and that words of seeming condition or postponement *are, if possible, to be construed as postponing the time of enjoyment rather than the vesting of the estate*; that, if it is doubtful whether words of contingency or condition apply to the gift itself or to the time of its enjoyment, they are to be construed as applying to the latter; and that the intent to postpone the vesting of the estate must be clear and manifest.” (Italics ours)

Dickerson v. Morse (Iowa), 202 N. W. 601.

Bryant v. Plummer, 111 Maine 511, 90 Atl. 171.

“When the gift of a legacy is absolute, and the time of payment only is postponed, the time not being of the substance of the gift is held to postpone the payment, but not the vesting of the legacy. * * *

“*The legacy must be regarded as vested when there is no provision for the lapsing of the legacy and no disposition of any remainder, if there should be any, after the death of the legatee.* * * * (Italics ours)

In re Blake’s Estate, 157 Cal. 448-459, 108 Pac. 287.

“The general rule is that where the legacy or devise is given to a person to be paid at a future time, it vests immediately. When, however, it is not given until a future time it is contingent and does not vest until that time occurs. As said in the note to *Goebel v. Wolf*, 113 N. Y. 405 (10 Am. St. Rep. 470, 21 N. E. 388), quoted approvingly by this court *In Re Rogers*, 94 Cal. 526, 530 (29 Pac. 962): ‘The leading inquiry upon which the question of vesting or not vesting turns is, whether the gift is immediate, and the time of payment or of enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving of age, or surviving some other person, or the like

* * * According to the prevailing doctrine, a postponement of the time of payment will not of itself make a legacy contingent unless it be annexed to the substance of the gift; or, as it is sometimes put, unless it be upon an event of such a nature that it is to be presumed that the testator meant to make no gift unless that event happened.
* * *, , ,

Sorrell v. McNalley (Fla.), 105 So. 106.

“All doubt as to whether a legacy is vested or contingent is resolved, if possible, in favor of vesting, if this can be done, by a fair and reasonable construction of the whole will, and no estate will be held to be contingent, unless very decided terms are used in the will, or it is necessary to so hold in order to carry out the other provisions or implications of the will. The overwhelming weight of authority is to the effect that devises vest at the death of the testator, unless there is a clear intent to postpone the vesting.”

The law favors the vesting of estates at the earliest possible moment and will not defer such vesting longer than the language of the testator plainly requires.

Herrell v. Herrell, 47 App. D. C. 30; 45 W. L. R. 747.

Estates are held to vest at the earliest possible period unless there is a clear manifestation of the intention of the testator to the contrary.

Wills v. Maddox, 45 App. D. C. 128; 44 W. L. R. 297.

The foregoing authorities show that the law favors the immediate vesting of estates, that estates will be regarded as vesting immediately unless a clear intention to the contrary is manifest; that estates must be regarded as vesting when there is no provision for the lapsing and no disposition of the remainder; that these principles apply to legacies as well as to any other portion of an estate and to equitable or beneficial interests therein as well as to the legal title.

All of these propositions apply to the will under consideration and to the beneficial or equitable ownership in one-half of the accumulating fund during each triennial period.

While this one-half was accumulating during each triennial period in whom was the beneficial or equitable title vested? If it be said that the manner of payment to the sisters and brothers, as set forth in item LXI and item LXII of the will, contravenes the idea of vesting, then the question presents itself: "To whom does the fund belong in the intermediate periods between triennial distributions?" Title to it, aside from the legal title admittedly held by the trustee, must reside somewhere.

Either the ownership of this fund,—the beneficial ownership, as distinguished from the naked legal

title,—is in the sisters and brothers of the testatrix until “the death of the last survivor” of them, or it is suspended like Mahomet’s coffin in mid-air.

We have seen that the law favors the construction which will vest title immediately and that title must be regarded as vesting immediately when there is no provision for a remainder or for the lapsing of the legacy. Applying these rules to the one-half of the accumulating fund in controversy, title thereto during the accumulation vested in the last surviving sister, or it vested in no one. The construction must be preferred which vests it in the surviving sister, rather than the construction which leaves the beneficial ownership thereof undetermined until the triennial period, during which accumulation occurs, elapses. The latter construction would be violative of the well-established legal principles just set forth, and would permit an estate to exist for three years without any one having a vested interest therein, which is a proposition abhorrent to law.

No statutory law and no decision of any court can be found which holds that during each three-year period of accumulation of this fund no one had any vested interest in the fund, no one had any title to the fund; or that the title and vested interest in the fund of the surviving brothers and sisters only came into existence one day in each third year and then immediately ceased to exist for another three-year period.

To state the matter another way, if the estate or title of the four sisters and two brothers did not immediately vest, upon what contingency did it depend? Testatrix very apparently understood and verily believed that there would be “surplus income” earned by the estate. She directed that it “shall be invested

and allowed to accumulate for a period of three years, when it shall be divided into two equal parts", etc. She then directed the manner of its disposition, and in respect of half of it she named her four sisters and two brothers as "beneficiaries" to receive it "share and share alike." Was this not a gift? Was it not a valid testamentary gift? Were there any conditions? Not one. *There was merely an instruction as to the time and manner of its distribution*, which clearly was for the convenience of the trustee in the management of the estate, and not in any respect in derogation of the title of the donees. No future event to occur or to fail to occur was named as competent to divest this title. No provision was made for lapse of the gift, or for gift over to another in the event of lapse. The gift having been absolute, the beneficial title thereto vested immediately and indefeasibly.

There is no shadow of doubt that the terminology of item LXI of the will imports an intention to convey a gift. It is not supposed that any party at interest could or would contend that there was no gift. Hence, there appears this situation, that a testamentary gift was made, *that it was a complete gift, without condition or restraint, without any intention to withhold any part of it, dependent upon no stated contingency whatsoever, but subject to a direction relating not to its substance, but to the manner and time of its delivery or payment, and this solely for the convenient handling of the rather considerable property.* It follows that there was bequeathed "a present fixed right of future enjoyment", or in other words, a vested estate. If this be not so, then a logical consideration of the matter would dictate a conclusion that the trustee has held and now holds the beneficial as well as the legal title,—a

proposition unsupportable in law,—or that the distributees of the corpus are to have more than the one-half of “Surplus income” intended by the testatrix to go to them,—an equally untenable proposition.

In whom did the one-half accumulations given to Mrs. Baldwin and her class vest during the lifetime of the members of this class or the last survivor?

It could not vest in the trustees. It certainly did not vest in the remaindermen. It could not have vested in the remaindermen because this one-half of the accumulations never became part of the corpus. Accordingly, as estates are deemed to vest at the earliest possible moment, it must have vested in the brothers or sisters, or their survivor, for whom the fund was created and to whom it was set apart.

When the income was separated from the corpus it became a separate and distinct entity. The income was a fund entirely divorced from the corpus and were it not for the provision that one-half be credited back to the estate no part thereof would have returned to the corpus. The one-half that went to the brothers and sisters never returned to the corpus nor attached itself thereto. It was and is as separate from the remainder as the estate of Janet M. Baldwin is from the estate of Alice Key Browne.

The property in controversy is not the corpus of the estate. Neither is it that one-half of the accumulations which the testatrix directed to be added to the corpus. It is that fund being one-half of the accretions termed “surplus income” which, by the terms of the will, was directed to be paid to the brothers and sisters of the testatrix until the death of the last survivor of them. The equitable title or property right of the brothers or sisters, or the survivor of them, in said fund arose or

vested immediately upon the taking effect of the will. Therefore, obviously it was vested in Janet M. Baldwin in her lifetime and upon her death ending the trust passed to her heirs and devisees, and not to the remaindermen named in the will of the testatrix, because it was not part of the corpus of the estate to be distributed to them.

Janet M. Baldwin upon the demise of the testatrix was (to quote the language of the Code, 31 Stat. 1432, c854) "deemed to have a legal estate" in her "beneficial interest".

Under the Code, *supra*, "no interest legal or equitable shall vest in the trustee" and since the estate must vest, it vested in, as provided in said Code: "the person entitled according to the true intent and meaning of such instrument", namely: Janet M. Baldwin according to the true intent and meaning of the will of the testatrix.

The two following cases were favorably cited in *Van Wart v. Jones*, (C. C. A. 4th) 295 Fed. 287-290 and other Federal Reports.

In *Whitridge v. Williams*, 71 Md. 105-109, 17 Atl. 938, the court ruled:

"Mrs. Williams was entitled to the income during her life; and the trustee had no authority to use any portion of it to repair the depreciation of the principal. That portion which was so converted into principal belongs to the personal estate of Mrs. Williams. * * *"

Certain it is, that no authority can be found in the will of the testatrix whereby any of the one-half accumulations to be paid to the brothers and sisters was to be added to the principal and made a part of the remainder. Under this test, as the courts have repeated-

ly held, the life income becomes vested as it did vest in Janet M. Baldwin.

The oft quoted case of *Burt v. Gill*, 89 Md. 145, 42 Atl. 968, involved a situation extremely similar to the one at bar and conclusively indicates that the one-half of the accumulating income was not part of the corpus of the estate which went to the nephews and nieces upon the death of Janet Baldwin, but was a separate fund vested in Janet Baldwin and passed to her heirs or devisees upon her death. The pertinent facts of *Burt v. Gill*, *supra*, are these.

The testator died leaving an infant daughter. Under the terms of his will he created a trust and provided that the trustees should use the income from the trust or so much thereof as might be necessary to support, maintain and educate the infant daughter until she should reach the age of eighteen years, and that thereafter until her death the income was to be paid to her and upon her death the corpus of the estate was to go to her children. The trustees used as much of the income as was necessary for the education and maintenance of the daughter until she reached the age of eighteen years. This did not require the use of all of the income and at the time the daughter reached the age of eighteen years there was a surplus of unused income. She claimed she was entitled to this surplus and the trustees disputed her right thereto, claiming that as its disposition to her was unprovided for in the will it was part of the corpus of the estate and should vest in her remaindermen. The court held that this income had been severed from the corpus of the estate and was not part thereof, and that, therefore, under the will it did not pass to the remaindermen, but was the property of the daughter who, under the will, had

a vested interest therein. The decision of the court is so applicable to the present controversy that at the risk of being prolix we will quote portions thereof.

At page 969 the court said:—

“The will nowhere makes any separate or distinct mention of the portion of the income which would remain unused if the trustees did not apply it all to the daughter’s support and education. There is no direction that it be retained or invested by the trustees, or accumulated *and added to the corpus of the estate, nor is there a separate disposition of it to be found in any part of the will.* * * *”

This language can be applied readily to the proposition under discussion. Nowhere in the will of the testatrix is there any direction that the accumulating one-half of the fund given to the brothers and sisters of the testatrix should be added to the corpus of the estate. On the contrary the provision that the other one-half should be added to the corpus of the estate clearly implies that the one-half given to the brothers and sisters was not to become part of the corpus of the estate. Nowhere in this will is there any separate disposition of this accumulating one-half. There is no direction in the will that it should go to the corpus of the estate, or that it should go to any remaindermen, or that the interest of the surviving brother or sister therein should lapse in the event of her death during a triennial period. The opinion then goes on to say (pp. 969-970):—

“We think that the construction of the will contended for by the appellees is the correct one. The clause of the will creating the trust seems to us to manifest a general intent on the part of the testator to dedicate to the use of his daughter the in-

come of the trust estate as long as she lived, and to preserve the corpus of the estate for her issue, or, in default of issue of her, for his two sisters. The daughter is excluded from the ownership and control of the corpus of the estate which cannot be encroached upon for her relief, no matter how meager the income may be and she ought not to be called upon to invest any part of the income to increase the corpus, unless the will distinctly requires it to be done. There is no express direction in the will to do anything with the income except to pay it to the daughter, or expend it for her benefit; *nor is there any suggestion or implied direction that any part of it should go to, or be applied to the benefit of, any other person, unless such an implication arises from the expressions used to describe the estate given at her death to the remainder-men.* We are unable to come to the conclusion that the words used to describe this remainder, *i. e.*, 'the whole amount of said trust funds and property,'—standing, as they do in this will, without explanation or specification, should be held to include any portion of the income which accrued during the life of the daughter. To accumulate the unused income now under consideration, and invest it for the benefit of the daughter for life, with remainder to her successors in the title to the trust fund, would result in making her father's will give to her an absolute estate in part of the income of the trust property, and only a life estate in the rest of it. We find nothing in the will indicating such an intention on his part. The law favors the early vesting of estates, and a direction to accumulate the income accruing during any portion of a life estate for the benefit of the remainder-men ought to appear expressly upon the face of the will, or to arise by necessary implication from its provisions. * * *

(Italics ours)

Here again the language of this opinion is applicable to the case at bar. The law favors the early vesting of estates. A direction to accumulate the income for the benefit of the remaindermen must appear expressly by the will or arise by necessary implication. In the present case there is no such direction either implied or expressed. The necessary implications require a contrary construction. The very fact that there is an express provision that one-half the accumulated income shall be added to the corpus indicates that the other one-half was not and was not to be part of the corpus of the estate. It was only the corpus of the estate which was to go to the remaindermen. There was no direction implied or expressed that the other accumulated one-half of the income which had not become part of the corpus of the estate should go to the remaindermen. The silence of the will on the subject clearly implies that the title to that one-half had vested in the surviving sister and was to go to the persons taking under her.

From the foregoing discussion it conclusively appears that under the will and the legal principles applicable thereto the fund in controversy was not part of the corpus of the estate of the testatrix at the time of the death of Janet M. Baldwin that it was her separate estate in which Janet M. Baldwin had a present vested interest subject to future enjoyment thereof; that as there were no provisions restricting or limiting this vested interest or providing that it lapsed if death occurred during the triennial period, or providing for a remainder over to any one, this vested interest passed to the estate of Janet M. Baldwin and to the persons entitled thereto, and not to the remaindermen entitled to the corpus of the estate of the testatrix.

The Postponement of the Time of Payment of a Legacy or of the Possession or Enjoyment Thereof Does not Prevent the Vesting Thereof, Nor Does it Affect the Construction of the Will Contended for by Appellants.

It will doubtless be claimed by appellee that as the enjoyment of the fund was deferred until the end of the triennial period that Janet M. Baldwin had no vested interest therein to pass to her heirs or devisees upon her death. This contention ignores the distinction between the vesting of an estate and the right to possession or enjoyment. The law is clear that an estate may vest immediately even though the possession or enjoyment thereof is postponed and that the postponement of the possession or enjoyment thereof does not prevent the vesting of the estate or affect the title of the one in whom the estate is vested. The authorities heretofore cited by us show that an estate may be vested when there is a present fixed right of future enjoyment.

69 C. J. 1669 above quoted;
Sec. 272 of Title 25, ch. 8, Code of District of Columbia, above quoted.

They show that as the law favors the vesting of estates that words of postponement will, if possible, be construed as postponing the time of enjoyment rather than the vesting of the estate.

Dickerson v. Morse, (Iowa) 202 N. W. 601,
quoted above.

Deferring the time of payment is not an element, which standing by itself, has ever induced any respon-

sible tribunal to hold an interest contingent rather than vested.

“If the payment is postponed for the convenience of the funds of the estate and not for reasons personal to the legatee or devisee, it should be held vested.”

Armstrong v. Barber, 239 Ill. 389-399, 88 N.E. 246, citing
Knight v. Portgiesser, 176 Ill. 368, 52 N. E. 934;
Carter v. Carter, 234 Ill. 507; 85 N.E. 292.
 30 Am. & Eng. Ency. 2d Ed. 771.

The *Armstrong* case, *supra*, is a leading case often referred to by the Federal Courts and cited as late as February 28th, 1934, in *Molter v. Com. of Int. Revenue*, 69 Fed. (2d) 7-10.

“If there is a present right to a future possession though that right may be defeated by some future event, contingent or certain, there is nevertheless a vested interest.”

McCauley's Estate, 257 Pa. 377-382, 101 Atl. 827.

Had the will provided that the remainderman take “with all interest and income that had not been paid” then we concede that such words in connection with a deferred period might be of convincing effect in favor of the opposers’ contention. But, the entire absence of such language places only one recognized construction on the triennial period, namely, that the postponement was ‘annexed to the time of payment and not the substance of the legacy’.

Brian v. Taylor, 129 Md. 145; 98 Atl. 532;
Fairley v. Kline, 3 New Jersey Law, 551-558;
Stahl v. Mohr, 172 N.E. 431.

“It is clear that upon the death of Mr. Von Post the legatees immediately took vested interests in his estate * * *. Although the time of payment was postponed, the legacies to be paid were definite and certain and not dependent on any contingency.”

Application of Miller, 288 Fed. 760, 766.

“Under this will the bankrupt’s interest in the income during his life is a vested interest.”

In re Baudouine, 3 Am. Bank. Rep. 55, 60.

“* * * the son as legatee acquired a vested right in the residue, though the actual taking of title by the son was temporarily postponed, pending administration and distribution; * * *.”

Chandler v. Field, 63 Fed. (2d) 13, 15.

“A bequest in the form of direction to pay at a future period vests in interest immediately if the payment be postponed for the convenience of the estate * * *.”

Cropley v. Cooper, 19 Wall. 167, 175, 86 U. S. 109.

The triennial period was an event only fixing the time of payment and as such Janet M. Baldwin had a vested interest that could not be divested unless there were express language in the will so providing.

Doe ex dem. Poor v. Considine, 6 Wall. 458, 73 U. S. 869.

“A legacy is not made contingent by postponing payment for the convenience of the estate.”

Page on Wills, Sec. 1124, citing
Martin v. McCune, 318 Ill. 585, 149 N.E. 489.

Heilman v. Heilman, 129 Ind. 59, 28 N.E. 310.
Johnson v. Coler, 187 Iowa 734, 174 N.W. 654.

“Though there be no other gift than in the direction to pay or distribute in future, yet if such gift or distribution appears to be postponed for the convenience of the fund or property, or where the gift is only postponed to let in some other interest, the vesting will not be deferred ‘till the period in question’.”

McClure's Appeal, 72 Pa. 414, quoted in
Little's Appeal, 117 Pa. 14; 11 Atl. 520.

“If a future event or time is involved, the nature of the interest depends on whether such future time or event concerns the gift itself or merely the payment of it. If the former, it is contingent if the latter, it is vested.”

Page on Wills, Sec. 1111, citing
In re Blake's Estate, 157 Cal. 448, 108 Pac. 287;
Dickerson v. Morse, (Iowa) 202 N.W. 601;
Pike v. Stephenson, 99 Mass. 188;
Smith v. Edwards, 88 N. Y. 92;
Geisler v. Reading Trust Co., 257 Pa. 329; 101
 Atl. 797;
Petition of Morris, (R. I.) 125 Atl. 84;
In re Mausur's Will, 98 Vt. 296; 127 Atl. 297;
In re Thayer's Estate, (Vt.) 130 Atl. 683.

The will clearly indicates that the provision for triennial payment was intended merely for the welfare of the immediate objects of her bounty, to wit, her brothers and sisters, and for the convenience of the trustee in the administration of the fund. As we have heretofore pointed out the testatrix clearly recognized that monthly, quarterly or yearly payment might not allow an accumulation to be of any practical value to

her brothers and sisters, while accumulations for three years might lead to larger sums which could buy profitable investments for them, and which would be less likely to be dissipated. As far as the convenience of the trustee is concerned it should be noted that the estate conveyed by the will was large, bequests were numerous, and the trustee selected was a corporate structure. The terminology employed suggests not that the testatrix desired or intended to withhold the gift, or to affix any condition to its enjoyment, but that the convenience of some person, agency or interest was consulted. This being so, we may well inquire: Whose convenience? Certainly not the convenience of the testatrix, whose demise was contemplated. Surely not the convenience of the donee, who could and would have accepted payments at any time. Certainly, therefore, the convenience of the estate itself and the agency appointed to manage it. The postponement of payments for three years was clearly for the benefit of her brothers and sisters, who were the primary objects of her bounty and with whose welfare she was vitally concerned. This postponement was clearly also for the convenience of the trustee in the administration of the fund. It is obvious that the provision for triennial payments merely refers to the time of possession and enjoyment and does not curtail, restrict or limit in any way the title of the brothers and sisters, or their survivor, to the fund. This provision under the law heretofore quoted is presumed not to so curtail, restrict, or limit their title. It is presumed to affect merely their right of enjoyment, and is to be so construed unless the contrary clearly appears. Needless to say, the contrary does not appear from the will expressly or by implication. As heretofore pointed out there is not a

syllable in the will which limits or restricts the vested interest of the brothers and sisters, or their survivor in this fund; creates a remainder over or provides for this vested interest lapsing in the event of death during a triennial period. No words to this effect appearing in the will the presumption that the postponement of the payment dealt solely with the right of enjoyment and did not affect the vesting of title controls, and this must be the construction given the will.

**Where Title has Vested Subject to Future Enjoyment
Death Before Such Enjoyment Does not Divest
Title, and Title Passes to the Heirs or Devisees of
the Person in Whom it is Vested.**

Where the vesting has taken place subject to future enjoyment, death during the interim between vesting and enjoyment will not divest the interest which has already vested. This principle is clearly established.

“Where the beneficiary survives the testator and the gift vests, his death before the time of payment or enjoyment occasions no lapse, but his rights pass to his heirs or personal representatives.”

Dorsey v. Dodson, 104 Ill. App. 589.

See also:

Cook v. Hayward, 172 Mass. 195; 51 N. E. 1075.

Hibler v. Hibler, 104 Mich. 274, 62 N. W. 361.

Warren's Adm. v. Bronson, 81 Vt. 121, 69 Atl. 655.

Loring v. Coolidge, 99 Mass. 191.

According to the foregoing principle as Janet M. Baldwin had a vested interest in one-half of the accumulating fund from April 18th, 1932, the date of the last triennial payment, to her death in January, 1934, her death did not divest her estate of this interest, and it passed to her heirs, or devisees. It must have done so because it was an estate in her for which there was no remainder over to any one else, and the will that gave it to her did not provide it should lapse if her death occurred during a triennial period. Given a vested interest without any provision limiting it, or providing for the lapse thereof, it must pass on the death of the owner thereof to her heirs, or devisees. Thus we see that the accumulating fund belonged to Janet M. Baldwin, but her enjoyment was postponed to the next triennial period, and upon her death the accumulating ceased, and the *corpus* of the estate from which the accumulation sprang went to the remaindermen, the nephews and nieces, and the accumulated fund belonging to Janet M. Baldwin passed to her heirs, or devisees.

This is not an unusual situation. In every case of a person with a vested right in an accruing income, although payable in the future, who dies during the period of accrual the accruing income is apportioned to his estate as of the date of his death. This is also a well-established rule.

Other cases where there has been an apportionment of the income are as follows:

Welch v. Apthorp, 203 Mass. 249, 89 N. E. 432, where the court held that the income should be treated as accruing from "day to day";

Union Safe Deposit and Trust Co. v. Dudley, 104 Maine 297, 72 Atl. 166, where the court held

the words "quarterly during his natural life" as being a direction as to manner and time of payment only.

Manice v. Manice, 43 N. Y. 303:

" * * * Where the terms of a bequest import a gift and also a direction to pay at a subsequent time, the legacy vests, and will not lapse by the death of the legatee before the time for payment has expired, but will pass to his personal representatives. * * *"

Tests.

If you test this case by other suppositive cases it becomes crystal-clear that the accrued income was the property of Janet M. Baldwin, and passed to her heirs or devisees. Suppose instead of being payable to her triennially it had been payable to her quarterly, monthly, or bi-monthly, it would be ridiculous in the face of the rule announced by the foregoing authorities to say that if she died in the middle of the quarter, or month, or half-month, that the amount accrued to the date of her death was not hers. In those cases it is obvious that her estate would be entitled to the accrued income up to the date of her death. The mere fact that the income was payable every three years instead of every week, or month, should not change the principle. Needless to say, it was necessary, as a direction to the trustees, to fix dates of payment, as the income accrued. If short intervals between payments would not divest her of her right to the accruals up to the time of her death, surely long intervals would not do so. Certainly there should not be one rule for weekly, monthly, quarterly or yearly payments and another

for longer intervals. These considerations demonstrate that the postponement of payments to every three years did not divest her of her interest in the accumulations up to the time of her death, and did not deprive her estate of the right to them.

It must be conceded that the testatrix was most concerned with the welfare of her brothers and sisters during their lives. Her primary object was that they should receive the benefit of the income from her fortune during their lives. It was her purpose that they should be taken care of and kept from poverty and want while they lived. It is inconceivable that she intended that if during a triennial period one of them became sick and destitute that he or she should die for want of funds. She must have considered that the accumulated fund was a protection to them against this very contingency and that they could borrow against their vested interest in this fund for their vital wants during the period of accumulation. Could it have been her intention that if Janet M. Baldwin had lived to one week before the next triennial period and was dying because of poverty and destitution she could not avail herself of her interest in this fund and have borrowed thereon to keep alive until the date of payment? The intention of the testatrix was to provide for her brothers and sisters to the end of their days, and not to cut them off at any distributive date. These considerations show the intention of the testatrix must have been to create a vested interest in this fund in her brothers and sisters, or their survivor, which vested interest could be used by them, and that the postponement of times of payment was not intended to limit the interest given, but only to postpone the right of possession of that interest.

Suppose Janet M. Baldwin had lived to within half an hour of the next triennial period, would it not seem ridiculous to contend that her estate had no interest in the accumulation? It could not be claimed that in that event her sister intended that she should have no rights in the accumulation, and that it should not be used to pay the expenses of her last illness and funeral expenses. Can it possibly be argued that her estate could then have no part of the accrual even though she had no money to bury her? Yet, if she were entitled to the accumulations if she lived to within a half hour of the next triennial payment, she is entitled thereto if she lived to within fourteen months of that payment.

Had Janet M. Baldwin been declared a bankrupt during her lifetime the trustee in bankruptcy would have stepped into her shoes and had a vested interest in the one-half income accumulated under item LXI.

The Court *in re Baudouine*, bankrupt, 3 Am. Bk. R. 55-60, held:

“The income sought to be reached is that accruing since the filing of the bankrupt’s petition and the adjudication in bankruptcy; and it is urged that such income is after acquired property, and not available in bankruptcy. But under this will the bankrupt’s interest in the income is a vested interest. * * *”

This ruling was made despite seeming statutory inhibitions to the contrary of the State of New York where the proceedings were had.

Had Janet M. Baldwin been an Alien Enemy during the late war, the Alien Property Custodian would have taken her vested interest in the one-half accumulations.

See: *In re Application of Miller*, 288 Fed. 760, 766.

Immediately upon the death of the testatrix, the surplus income was to be invested and that income, representing *principal* plus its earnings representing accumulations were to be paid at stated periods—one-half to Janet M. Baldwin and her class or the survivor and one-half to the corpus. Thus it was, that provision was made to pay Janet M. Baldwin and her class the income immediately it was earned.

The fact that the income was not paid directly to her but was deposited in a fund for her account is of no legal significance. The point is that provision was made for her and her class or the survivor to enjoy the benefits of such earnings under the fund that became existent immediately upon the death of the testatrix. The income was cut off from the estate legally segregated therefrom and became the account of Janet M. Baldwin, her sisters and brothers, or the survivor of them.

A bank may place a restriction on withdrawals at any period allowed by law, but such restriction delaying enjoyment in no wise lessens the title of the depositor.

The will of the testatrix simply established a savings account for Janet M. Baldwin and her class and, to enable them to get a reasonable return on that account, restrictions were imposed as to the date of withdrawal. The principal of the account, namely: one-half of the income plus the interest, namely: the accumulations, were always on deposit for the account of Janet M. Baldwin and her class.

The event that the time would come when she would die and the fund would be withdrawn in toto did not

stop the title to the fund from vesting in Janet M. Baldwin up to the date of her death. And whatever estate was vested in Janet M. Baldwin at the moment of her death passed to her heirs.

Chandler v. Field, 63 Fed. (2d) 13, 14;
Burt v. Gill, *supra*.

The fact that the two one-half interests were allowed to mingle gave them no relationship. No more than Jones has any title to Brown's money because both accounts are in the same bank and mingled by the bank in the process of its investments.

Pay and Divide Rule Invoked by Appellees is Not Applicable.

The "Pay and Divide" rule was cited at the hearing by counsel for certain of the defendants. This rule has been the subject of much controversy and the courts refuse to follow it whenever from the slightest circumstance it can be avoided. We quote from 1918 E, Lawyers Reports Annotated, p. 1108:

"The foregoing rule has been the subject of both criticism and approval. Although it may be a useful rule, where kept in proper subordination, the tendency of the courts to give it undue prominence as an evidence of the testator's intention has certainly been productive of some incorrect decisions; and, taken all in all, it has raised more doubts than it has resolved."

In re Lotz, 92 Misc. 683, 157 N. Y. S. 685, it is said:

"The rule that such direction imports contingency in the gift is among those canons of construction which the appellate courts have been more zealous

to escape than to obey. No doubt the rule, in its general form, rests in logical security upon the grammar, but it is equally sure that in the direction to trustees to pay over and divide in remainder, the actual intention has often been defeated. Hence, the courts have revolted from the injustice thus caused, and the homely instinct of righteousness has compelled the qualification that, when the gift over is contained only in the direction to pay and divide at the end of an intermediate estate, the gift shall not be contingent if by the utmost effort and cunning a contrary intention can be detected in the will."

In re Van Kleek, 95 Misc. 40, 158 N. Y. S. 539, it was said that it is apparent that while the rule is well-recognized by the New York courts, the judicial desire to construe estates as vested rather than contingent has led the courts to subordinate a rule of property to a construction dependent upon the ascertained intention of the testator.

In other words, it is not an absolute rule, but only creates an implication of contingency, which may be overcome by the context, and which, according to some cases, is not sufficient of itself to indicate an intention to make the gift contingent.

1918 E—L. R. A. p. 1110.

The application of the rule (pay and divide) has ordinarily been confined to cases where the gift was to a class and the beneficiaries, as to their identity and number, could be definitely ascertained only at a future time; and the courts hesitate to apply it where the legatees are named or otherwise specifically designated. 1918 E—L. R. A. p. 1112.

Among the numerous exceptions to the rule, we find that the severance of the subject matter of the legacy from the corpus of the estate, as by a direction that it be set apart by the executors or given to trustees for the purpose of paying the legacy, is considered as a circumstance indicative of an intention that the gift shall vest in interest immediately. *1918 E—L. R. A.* p. 1126, citing numerous cases.

The fact that a devise or legacy is given through the intervention of a trustee is without bearing on the question whether it is vested or contingent.

Gifts or shares or legacies, to be paid out of a fund or surplus to be collected in, or ascertained and divided, may be held to vest absolutely, before the fund is collected or the surplus ascertained or the division actually made. *1918 E—L. R. A.* p. 1129.

The vesting of a legacy is not prevented by a provision for survivorship among the legatees; on the contrary, the fact that the will contains a clause of survivorship, which would be wholly useless if the vesting in interest were postponed, is a circumstance going to show an intention to give an immediate interest. *1918 E—L. R. A.* p. 1130, and cases cited.

Neither Janet M. Baldwin, Nor Appellants, are Estopped to Claim the Fund in Controversy, and the Acceptance of Previous Triennial Payments was not an Interpretation of the Will Contrary to Appellants' Present Contention.

Appellees have contended that appellants are estopped to claim the fund in controversy. There is no issue of estoppel in this case, nor is there any testimony from which an estoppel can be invoked against

the defendants, Murray Baldwin and David Cosgrave, executors of the estate of Janet M. Baldwin.

To explain our position in this regard, let us first recall the definition of "estoppel". An estoppel in pais operates when a person, either by his language or conduct, or both, misleads or induces another to alter or change his position in some respect or influences his conduct in such a way so that it would work an injustice to the latter if the former were permitted thereafter to show that the language used or conduct exhibited by him was untrue or misleading.

Drury v. Gorrell, 44 App. D. C. 518.

A party pleading an estoppel in pais must be able to show, among other things, that he relied upon the conduct of the person against whom the estoppel is urged. (*Washington Loan & Tr. Co. v. Convention of P. E. Church*, 54 App. D. C. 14.) It is submitted that the parties defendant herein who invoke the doctrine of estoppel have not pleaded nor have they shown any facts concerning the conduct of Janet M. Baldwin upon which they relied. Hence, they are not in any position to invoke such doctrine.

It has been held that a party will not be estopped unless the act relied upon has resulted in the prejudice of him who relies upon it as an estoppel. (*Bowen v. Howenstein*, 39 App. D. C. 167.) Where has any act of Janet M. Baldwin prejudiced the interest of the nieces and nephews, parties to this proceeding, and who are the ultimate beneficiaries of the estate?

To enable a party alleging equitable estoppel to avail himself of it, *he must show that* relying upon the truth of the representations which worked the estoppel, *he*

changed his position to his disadvantage, so that it would be a fraud upon him to permit the party estopped to show that his representations were not true.

National Safe Deposit Co. v. Gray, 12 App. D. C. 276.

It is argued that the acquiescence of Janet M. Baldwin and her co-tenants in accepting triennial settlements in the manner shown on the statements in evidence, amounts to an interpretation by them of the will insofar as distribution of the fund in controversy is concerned. All the evidence before the court is that triennial settlements were made. There is not a whit of testimony showing the circumstances existing at the time of the distributions by the trust company, and whether there were any personal representatives claiming the fund or what, if any, arrangement was had or effected between the sisters and brothers respecting the receipt and disposition of said settlements. There is no evidence that upon receipt of a triennial settlement that the surviving brothers and sisters did not apportion it with the estate of one who had died during the triennial period, and did not comply with the construction of the will for which appellants here contend. Consequently, the mere acceptance of triennial settlements in and of itself means nothing in this case.

If this was a controversy between the sisters and brothers, or the legal representatives of the sisters and brothers, there might perchance be some question of estoppel raised, but this is a controversy between the personal representative of the last life beneficiary and the remaindermen. Whatever distribution was

made among the life tenants could not in any wise affect the amount accruing to the remaindermen.

If the conduct of the sisters and brothers is to be considered as any construction of the gift at all, it should be in favor of the gift being a joint gift with the right of survivorship, the last survivor taking the whole estate. This is borne out by the terms of the will itself, which provides that they shall enjoy the fund until the death of the last survivor. Consequently, upon the death of each sister and brother, the survivors took the whole. While there is no testimony to guide the court, we submit it is just as reasonable to suppose that the sisters and brothers, in receiving settlements from time to time from the trust company, did so in the belief that they were joint tenants with the right of survivorship. This is just as plausible as to deduce that their conduct was in the nature of an estoppel, which prevents them from at this time seeking a proper construction of the will. There is no evidence before this court of conduct by these sisters and brothers, individually or collectively, from which it can be inferred that the acquiescence of any one of them in the manner of distribution of the estate as made by the trustee, amounted to a construction on their part that their estate was either vested or contingent. The will itself provides for the right of survivorship, which is an incident to joint ownership.

We cannot and do not admit the contention that the action of the sisters and brothers in accepting triennial settlements of the trust fund under the will, is in any sense a construction on their part of the extent and nature of the gift under the will. There are several reasons why we cannot subscribe to the position taken by our esteemed contemporary:

1. It is only where a contract or document is ambiguous that room is left for speculation as to the real intention of the parties, and canons of construction are not resorted to for the purpose of determining the meaning of contracts, save where ambiguity exists.

Machen v. Yost, 54 App. D. C. 261;
No-Lead-O Piston Ring Co. v. Chandlee, 53 App. D. C. 128.

Since the law has construed expressions identical with those involved in the instant case, there are no ambiguities to be explained. The will itself is plain and free from doubt. It gives a vested estate to a number of designated persons and to the last survivor of them. Therefore, what Janet M. Baldwin and her sisters and brothers may have done regarding acceptance of benefits can have no bearing in a decision of the question of law involved. The question of law is for the court. Where there is no dispute about the terms of the contract, the legal import of the contract is a question of law for the court and not a question for the jury.

Turner v. Mertz, 55 App. D. C. 177.

Again, while it is true that in determining the meaning of an indefinite or ambiguous contract, the construction placed upon the contract by the parties themselves may be considered by the court in determining the meaning of a contract, we submit that this is not a question of the determination of the meaning of a contract between the parties themselves. This is a will and the intent of the testator in the use of certain expressions is the question at issue,—not what someone else may have thought the testator meant.

Conclusion.

Accordingly we submit:

(1) That one-half of this accumulating fund was severed from the corpus of the estate and never became part thereof, and that the will clearly so shows;

(2) That Janet M. Baldwin had a vested interest in this fund;

(3) That no limitation or restriction or remainder over was created by the will to this vested interest;

(4) That this vested interest was the property of Janet M. Baldwin, and on her death became part of her estate;

(5) That as this fund was not part of the estate of the testatrix, but was separate therefrom it did not pass under item XLII to the nephews and nieces, but passed to the estate of Janet M. Baldwin, the owner thereof.

These conclusions follow irresistably from an examination of the will and an application of the principle of construction thereto, and compel the conclusion that the estate of Janet M. Baldwin is entitled to the one-half of the fund accumulated from April 18, 1932 up to her death and that judgment in this action, therefore, should be in favor of the executors of her will.

Respectfully submitted,

CHARLES D. HAMEL,
RAYMOND BENJAMIN,
Attorneys for Appellants.

Of counsel:

HERBERT W. ERSKINE.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED SEP 23 1935

Frank J. Rodgers
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

APRIL TERM 1935

No. 6454.

MURRAY BALDWIN, Individually, and MURRAY BALDWIN
AND DAVID COSGRAVE, Executors of the Estate of
JANET BALDWIN, deceased, *Appellants*,

v.

NATIONAL SAVINGS AND TRUST COMPANY, a corporation,
Trustee under the last will and testament of
ALICE KEY BROWNE, deceased, et al., *Appellees*.

**BRIEF FOR NATIONAL SAVINGS AND TRUST
COMPANY, TRUSTEE UNDER THE WILL OF
ALICE KEY BROWNE, DECEASED, APPEL-
LEE.**

The National Savings and Trust Company, as trustee under the last will and testament of Alice Key Browne, deceased, submits to the Court that the conclusion reached by the Court below, as embodied in

the decree appealed from (R. pp. 39-40) is correct. It is in accord with the construction placed upon the will by this appellee, and distribution of the estate has been made in conformity therewith from the time of the death of the first of the brothers and sisters of the deceased, which occurred in 1907, as shown by the agreed statement of evidence appearing on pages 42-44 of the record. No contention to the contrary was made during all these years until brought forward by the appellants herein, who stand in the shoes of Janet Baldwin, one of the sisters of said deceased, and who had acquiesced in and received distributions in accordance with such construction.

It is respectfully submitted the decree appealed from should be affirmed.

BENJAMIN S. MINOR,
ARTHUR P. DRURY,
*Attorneys for National Savings
and Trust Company, Trustee.*

H. PRESCOTT GATLEY,
Of Counsel.

IN THE
United States Court of Appeals
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APRIL TERM, 1935.

No. 6454.

MURRAY BALDWIN, INDIVIDUALLY, AND MURRAY BALDWIN
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NATIONAL SAVINGS AND TRUST COMPANY, A CORPORATION,
TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF
ALICE KEY BROWNE, DECEASED, ET AL., *Appellees*.

BRIEF FOR APPELLEES, EDWARD TURNER
MESSERSMITH, ALICE CUTTS MYERS, DAN-
IEL K. TURNER, JR., ANNA KEY PALMER
(FORMERLY ANNA MACE), AND RICHARD
M. CUTTS, JR., AND AMERICAN SECURITY
AND TRUST COMPANY, EXECUTORS OF THE
ESTATE OF RICHARD M. CUTTS, DECEASED,
AS LEGATEES, AND WELLS FARGO BANK
AND UNION TRUST COMPANY, A CORPORA-
TION, ASSIGNEE OF DANIEL K. TURNER, JR.

WALTER M. BASTIAN,
Attorney for Said Appellees.

HELLER, EHRMAN, WHITE AND MCAULIFFE,
Of San Francisco, California,
Of Counsel.

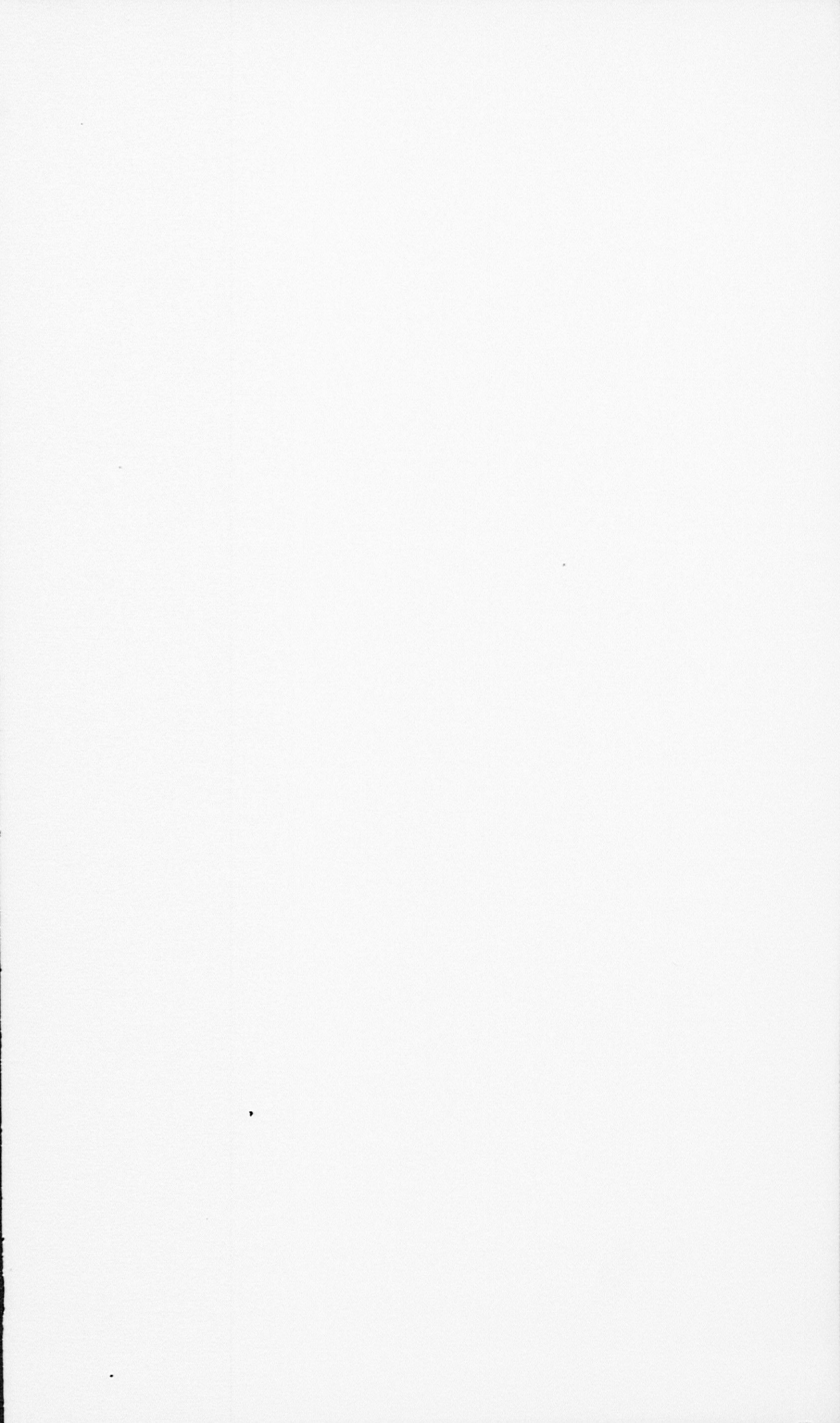


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TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF
ALICE KEY BROWNE, DECEASED, ET AL., *Appellees*.

**BRIEF FOR APPELLEES, EDWARD TURNER
MESSERSMITH, ALICE CUTTS MYERS, DAN-
IEL K. TURNER, JR., ANNA KEY PALMER
(FORMERLY ANNA MACE), AND RICHARD
M. CUTTS, JR., AND AMERICAN SECURITY
AND TRUST COMPANY, EXECUTORS OF THE
ESTATE OF RICHARD M. CUTTS, DECEASED,
AS LEGATEES, AND WELLS FARGO BANK
AND UNION TRUST COMPANY, A CORPORA-
TION, ASSIGNEE OF DANIEL K. TURNER, JR.**

STATEMENT OF FACTS.

On or about the 21st day of March, 1905, Alice Key Browne died a resident of the District of Columbia, leaving a last will and testament which was duly admitted to probate by the Supreme Court of the District of Columbia on the 17th day of April, 1905.

By Item LIX of said last will and testament the testatrix gave, devised and bequeathed the entire remainder of her property to the plaintiff in this action, in trust for certain specified purposes. In said Item LIX Mrs. Browne provided for the payment of monthly sums to each of her six brothers and sisters so long as they respectively should live. These monthly payments were in varying amounts as to each brother and sister according to their needs and station in life. After the death of each of said brothers and sisters it was provided that certain monthly payments should be made to designated children of each of the brothers and sisters, or, as in the case of one brother, to his widow, during the life of each or until the final distribution of the estate as thereafter provided. Item LIX further provides for the payment of minor annuities from income to certain specified cousins for their respective lives. Item LX directs the trustee to withhold from distribution on the death of the last survivor of the brothers and sisters a sum sufficient to provide income for the annuities to the surviving cousins.

By Item LXI the decedent provided as follows with respect to the distribution of any surplus income which might remain after the monthly and annual payments stipulated for in Item LIX aforementioned:

“ITEM LXI. Should any income from my estate remain after payment of the bequests hereinbefore mentioned, such surplus income shall be invested and allowed to accumulate for a period of three years, when it shall be divided into two equal parts; one of such parts shall be distributed among my brothers and sisters mentioned as beneficiaries of the residuary portion of my estate, or their survivors, share and share alike; and the other portion shall be added to the corpus of my estate. This accumulation shall continue during consecutive periods of three years, and at the end of each period of three years, distribution shall be made in the manner above mentioned.”

Item LXII, providing for the termination of the trust and the distribution of the estate upon the death of the last survivor of the brothers and sisters, reads as follows:

“Item LXII. Upon the death of the last survivor of my four sisters, Ellen K. Messersmith, Elizabeth H. Turner, Janet M. Baldwin and Emily Virginia Cutts, and of my two brothers, Daniel Turner and Frank K. Turner, I direct my Trustee to convert my entire estate then remaining (with the exception of the parts, if any, to be set aside for my cousins) into cash, and divide the same equally among my nephews and nieces, Edward Turner Messersmith, Murray Baldwin, Richard M. Cutts, Daniel Turner, Junior, Anna Mace and Alice G. Cutts Myers. Should any of said nephews or nieces be then dead, the share which he, she or they would have received if living, shall be paid in equal shares to his, her or their children then living. Should such deceased nephews or nieces have died without issue, his, her or their share or shares shall be divided among the survivors, or their respective issue.”

It should be pointed out that by Item LXII all the nieces and nephews of the testatrix share equally in the distributable estate, with the exception of John Temple Grayson, Jr., the son of Elizabeth H. Turner. In Item LIX the reason for discriminating against John Temple Grayson, Jr., in the distribution of both income and principal was stated by the decedent.

The specific problem now under consideration is as to the proper construction of Items LXI and LXII set out above. Janet M. Baldwin, the last survivor among the brothers and sisters of the testatrix, died January 22, 1934. The last triennial payment made under Item LXI was paid to Mrs. Baldwin on April 17, 1932. At the time of the death of Mrs. Baldwin a substantial sum of surplus income had accumulated in the hands of the trustee. The executors of the estate of Mrs. Baldwin now claim one-half of said surplus income. To sustain this contention it is necessary that the interest of the several brothers and sisters in said surplus income be held to accrue as of the *commencement* of each triennial period. However, if said bequest of surplus income is conditioned upon survivorship until the triennial distribution date, then the contention of the executors of the estate of Mrs. Baldwin must fail. It must likewise fail if, by reason of the acceptance by Mrs. Baldwin during her lifetime of her share of the surplus income on the respective deaths of her brothers and sisters, her executors are estopped from now contending for a different theory of distribution of the surplus income than that pursued during her lifetime when the same was for her benefit and thus accepted by her.

APPELLEES' ARGUMENT.

I.

Intention of Testatrix as Shown by the Will Is Controlling, and Clearly Refutes the Claim of Appellants.

As stated by the Supreme Court of the United States:

“The first and correct rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law.”

Smith v. Bell, 31 U. S. (6 Peters) 68; 8 L. Ed. 322.

All rules of construction yield to the intention of the testator plainly expressed, and it is only when such intent is not made reasonably clear by the terms of the instrument itself that resort will be had to technical rules of construction.

Fifer v. Allen, 81 N. E. 1105 (Ill.);
In re Brown's Estate, 137 Atl. 132, 137 (Pa.);
In re Beach's Estate, 151 Atl. 654, 657 (Vt.);
O'Hare v. Johnston, 113 N. E. 127, 130 (Ill.);
Camman v. Bailey, 103 N. E. 824 (N. Y.).

It is submitted that an analysis of the last will and testament of Alice Key Browne shows beyond doubt that it was her intent that only those brothers and sisters who survived at the end of each triennial period should receive any share of the surplus income, and that all sums now in the hands of the trustee, whether

of accumulated income or principal, should be distributed according to the provisions of Item LXII of her will. The general scheme followed by Mrs. Browne in drafting her will should be carefully noted. She provided for monthly payments for each of her brothers and sisters as long as each should live, the amounts of such payments varying according to the circumstances of each. Upon the death of any brother or sister, monthly payments were to be made to designated children of each deceased brother and sister until the termination of the trust and for as long as each such child should live. However, John Temple Grayson, Jr., son of Elizabeth H. Turner, was to receive the sum of \$100 upon the death of his mother rather than a monthly payment such as was given to each of the testatrix's other nieces and nephews. At the top of page 16 of the will appears the following with regard to the bequest to John Temple Grayson, Jr.

“My reason for thus discriminating against my nephew, which reason I desire him to know, is due to the fact that he has been disloyal and undutiful toward his mother, and at the age of twenty-one years left his mother and has since been living with his father, who for more than ten years contributed nothing to his support.”

Upon the death of the last surviving brother and sister the trustee is directed “to convert the entire trust estate then remaining * * * into cash, and divide the same equally” among the nieces and nephews therein designated (Item LXII).

From the will as a whole it seems clear that the testatrix intended to keep her property within her

own family and to confine its ultimate distribution to her own descendants. It is the policy of the courts to support such an intent when evidenced by a testator.

See:

In re Beach's Estate, 151 Atl. 654, 657 (Vt.);
In re Westchester Trust Co., 159 N. Y. S. 887, 889.

Mrs. Browne carefully noted the needs of each of her blood relations and provided for each according to his or her needs. Thus she stipulated for monthly payments to her brothers and sisters and upon their decease for monthly payments to the children of said brothers and sisters (with the exception noted above—Item LIX); upon the death of the last surviving brother and sister the entire estate was to go to the children of the brothers and sisters (again with the exception noted above—Item LXII). Were the contention of the executors of the estate of Mrs. Baldwin to prevail, the result would be that John Temple Grayson, Jr., as the son of Mrs. Turner, would have received substantially more from the estate of Alice Key Browne than she obviously intended him to get, especially on the theory of Mrs. Baldwin's executors, if his mother had been the last survivor of the brothers and sisters. We must look at the situation as of the time of the execution of the will. If Mrs. Turner died intestate, her son, John Temple Grayson, Jr., would take as heir, and if she died leaving a will, he would, as a natural object of the bounty of his mother, be more likely than not to share substantially in her estate. Thus had the accumulated income at the death of Mrs. Turner been paid to her estate, said income would in all probability have gone in a considerable proportion to this same John Temple Grayson, Jr., in

contravention of the wishes expressed in the will of Alice Key Browne. To hold that accumulated unpaid surplus income should be paid to an estate of a brother or sister who dies prior not only to the date of distribution but to the date for determination of what is surplus income, would be clearly to frustrate the obvious intent of the testatrix. It should be borne in mind again that Mrs. Browne specifically made provision for the children of each of her brothers and sisters, and in one instance for the wife of a brother, whom she desired to benefit, independent of any right to surplus income which might have accumulated prior to the decease of the parent or spouse.

In the presence of such an integrated scheme and the use of clear language to express an obvious and understandable intent, it is submitted that the contention of the executors of the estate of Janet M. Baldwin cannot prevail.

II.

Rules of Construction Applicable to Mrs. Browne's Will Demand the Conclusion That a Brother or Sister Must Survive to the End of a Triennial Period in Order to Share in Surplus Income.

A. Specific Language Overrides Policy in Favor of Vesting.

It is provided in Item LXI that should any income remain after the payment of the monthly bequests hereinbefore considered,

“such surplus income shall be invested and allowed to accumulate for a period of three years,

when it shall be divided into two equal parts; one of such parts shall be distributed among my brothers and sisters mentioned as beneficiaries of the residuary portion of my estate, or the survivors, share and share alike; and the other portion shall be added to the corpus of my estate. This accumulation shall continue during consecutive periods of three years, and at the end of each period of three years, distribution shall be made in the manner above mentioned."

We thus find a direction to the trustee to accumulate surplus income, to invest and allow surplus income to accumulate for a period of three years, at which time it is to be divided into two portions, and it is not until the end of each three-year period that that portion of the income properly allocable to the brothers and sisters can be ascertained. This particular method of treatment by the testatrix would in the presence of the general scheme of her will seem to compel only one conclusion, that a brother or sister must be living at the distribution date to share in surplus income. Assuming, but by no means conceding, however, that such intent of the testatrix cannot reasonably be ascertained from the terms of the instrument, applicable rules of construction lead to an identical conclusion.

Even in the presence of a recognized policy in favor of early vesting of estates, the intent of the testatrix as expressed by the will itself will be carried out by the courts. This recognized principle is succinctly stated in

Kecheley v. Kecheley, 175 N. E. 237 (Ohio) at 238:

"where the intention of the testator as shown by the will is that the vesting of the estate shall be postponed, such intention will control."

In cases of doubt as to whether an interest is contingent or vested, and it is submitted that here there is no such doubt, courts are frequently influenced by the particular circumstances involved. The rule in favor of vesting originated because of the common law rule of destructibility of contingent remainders in realty and because of the rule against perpetuities. The interest here is one in personalty, so that the same is not destructible. There is no problem in connection with the rule against perpetuities, such as that which existed in

O'Hare v. Johnston, 113 N. E. 127 (Ill.)

and which influenced that court to construe a particular estate as vested. Nor would an intestacy here result if the interest of the brothers and sisters is construed as contingent, as would have been the case in

Fulton Trust Co. of New York v. Phillips, 113 N. E. 558 (N. Y.).

Not only is the word "survivors" used in Item LXI so that no question could arise, at least as to those brothers and sisters who predeceased Mrs. Baldwin, but even as to her, the last survivor among the brothers and sisters, there is a definite provision made in Item LXII for a remainder over. There is then no particular circumstance which might justifiably influence this Honorable Court to interpret the particular interest here involved as vested prior to the death of the life tenant, Mrs. Baldwin.

B. Futurity Annexed to the Gift.

While it is a recognized rule of construction that a mere postponement of the time for payment will not in and of itself be considered sufficient to result in the interest being contingent rather than vested, the particular wording of the bequest may be such as to demand the conclusion that the interest is contingent. It should here be noted that in speaking of a contingent interest in personalty we purport to indicate that said interest is not descendable. It is apparent from the language of Item LXI quoted on page 2, that there are no words of direct gift to the brothers and sisters, except those which are contained in the clause providing for the accumulation of interest and its division and distribution at the end of each three-year period. As said by the Supreme Court of Pennsylvania in

Smith's Estate, 226 Pa. 304, 75 Atl. 425, 426;

“Where a legacy is given to a person to be paid at a future time it vests immediately. But when it is not given until a certain future time, it does not vest until that time, and, if the legatee dies before, it is lost * * *.”

The rule that a bequeathed interest is contingent where the only words of gift are to be found in connection with the direction as to division and distribution finds almost unanimous support in the courts in this country. The often quoted case of

Moore v. Smith, 9 Watts 407 (Pa.),

states the rules as follows:

“The ruling principle of a case like this is that where there is no separate and antecedent gift

which is independent of the direction and time for payment, the legacy is contingent; and it seems to be as well founded in reason as rules of interpretation usually are. Where a gift is only implied from a direction to pay, it is necessarily inseparable from the direction and must partake of its quality; insomuch that if the one is future and contingent, so must the other be."

In *In re Levey's Estate*, 239 N. Y. S. 368, 135 Misc. Rep. 413, the court considered the clause:

"I give, devise and bequeath the same unto my said executors in trust during the life of my son, Clarence D. Levey, to pay over to him the net income arising therefrom, and at his death to pay the principal of said one-third one-fourth share or portion unto the children of Clarence D. Levey, the issue of any deceased child to take the parent's share; * * *."

It was held that the vesting of the remainder was postponed until the death of Clarence D. Levey, the court saying:

"the only words of gift are found in a direction to pay over the fund in question at a future time to-wit upon the death of Clarence D. Levey. There are no words of present gift in this will. 'Futurity is annexed to the substance of the gift.' "

To the same effect see:

In re Phearman's Est., 232 N. W. 826 (Ia.);
In re Sternbergh's Estate, 95 Atl. 404 (Pa.);
Estate of Blake, 157 Cal. 448;
Matter of Crane, 164 N. Y. 71, 58 N. E. 47.

It is true that an exception to the postponement of vesting rule exists where the postponement of distri-

bution is only for the purpose of letting in an intermediate interest or for the convenience of the estate, and not for reasons personal to the testator.

Blackstone v. Chandler, 130 Atl. 34 (Del. Ch.).

But clearly this exception does not apply here. Were all of the surplus income for the benefit of those to whom stipulated monthly payments had been provided, the exception might perhaps be urged, but where, as here, only one-half of the surplus income is given to those who are previously provided for, the other one-half going to principal, it is apparent that the testatrix in her disposition of surplus income had a reason beyond that of assuring payment of the monthly bequests. The principle that, where postponement is personal to the testator, the bequeathed interest will be held contingent, was recognized by the Supreme Court of Illinois in *Pearson v. Hanson*, 82 N. E. 813.

C. The Divide and Pay Over Rule.

A rule somewhat similar to that with regard to futurity being annexed to the gift finds expression in the so-called "divide and pay over rule." This rule of construction and interpretation is to the effect that where the only words of gift are contained in a direction to a trustee or executor to divide and pay over portions of a particular fund or property, the interest bequeathed or devised is contingent upon survivorship at the time of division and payment. It is to be noted that in Item LXI the trustee is directed to divide the surplus income at the end of each three-year period into two equal parts, one of which parts should be distributed unto the brothers and sisters of the testatrix, or

their survivors. It is submitted that this Item clearly brings the disposition within the scope of the divide and pay over rule.

In re Leverine, 125 Misc. Rep. 130, 210 N. Y. S. 605.

“Among the most useful and frequently employed of these aids to interpretation is the so-called ‘divide and pay over rule.’ * * * which is to the effect that, where the terminology of the testamentary document contains no direct gift to the individual, but the donation is effected merely by a direction to another to make division and payment over, futurity is implied, and no vesting of the subject matter of the gift in the donee will take place prior to the time that the particular distribution is directed to be effected.”

In re Hopner's Will, 266 N. Y. S. 430, 432.

See also *In re Keogh*, 95 N. Y. S. 191, at 194.

D. The Gift of Surplus Income to the Brothers and Sisters of the Testatrix Under Item LXI Is a Gift to a Class and is Therefore Contingent Upon Survivorship at the Time of Distribution.

Where at the time a gift is made the number of beneficiaries who will be entitled to take is uncertain and the share each is to receive is dependent upon the number who shall survive, the gift is one to a class. This definition applies even though the beneficiaries are named where the enumeration is merely for the purpose of fixing with certainty the members of the class.

In re Billing's Estate, 110 Atl. 767 (Pa.).

Where the gift is one to a class it has been held that those who are to constitute it are to be determined at the time of distribution (*Haskins v. Tate*, 25 Pa. 249) and this conclusion is buttressed by the fact that survivorship is provided for among the members of the class.

In *In re Westchester Trust Co.*, 159 N. Y. S. 887, the court considered the question as to whether the estate of a deceased grandchild who died before the life tenant was entitled to share in the remainder interest bequeathed under the terms of a will which provided, *inter alia*, that the trustees should, upon the death of the life tenant, "pay and transfer the principal thereof to her lawful issue." It appeared that at the death of the testatrix the daughter had two living children, one of whom died, as aforementioned, before the death of his parent. The court held that the estate of the deceased child was entitled to no share in the estate, and said at page 888:

"Where there is a gift of personalty to a class distributable on a future event, that class consists of 'those who answer the description and are capable of taking at the time of distribution.' "

Delaney v. McCormack, 88 N. Y. 174, 183.

E. Judicial Construction of Provisions Similar to Those Contained in the Will of Alice Key Browne.

The Supreme Court of Alabama in *Crawford v. Carlisle*, 89 So. 565, had occasion to consider a will which disposed of surplus income to children of the testator. The executors were directed to set aside a portion of the estate sufficient in amount suitably to maintain and

care for the wife of the testator during her life. It was thereafter provided that

“After the bequest or provision for my said wife as set out in the preceding paragraph of this my last will and testament has been properly provided for and met by my said executors, I desire, direct, bequeath and devise that my said executors shall annually ascertain and state the profits remaining after the provisions for my said wife has been met shall be equally divided, share and share alike among my surviving children, to-wit, J. L. Crawford, R. D. Crawford, Elma Creel, and Ethel Wilson, but this division of profits and incomes does not refer to or affect the corpus of my estate, but only relates to such profits and incomes as may annually accrue to and grow out of my said estate, the corpus of my said estate remaining intact at all times and shall not be reduced or impaired.”

The court commented upon this particular portion of the will at page 570:

“The use of the words ‘surviving children’ in Items 4 and 5, when considered with the other provisions of the will, shows that testator’s intention was to bequeath the income remaining after meeting the needs of his wife to such of his children *who survive each recurring dividend period * * **” (Italics supplied.)

And at page 571:

“The condition precedent to the right of participation in an annual distribution of profits is that the children or grandchildren * * * be in life not only during the period of and on the termination of the estate for years created for testator’s surviving children but thereafter at such recurring annual dividend period.”

The facts of the Crawford case, although not involving a question of apportionment, are particularly pertinent here because of the ruling of the court that survivorship at the distribution date was a condition precedent to the right to take. There, as here, surplus income only was to be paid to a class, the members of which were specifically named.

In *Equitable Trust Co. v. Jennings*, 189 Ill. App. 359 (1914), the court construed the terms of a will which provided that the income of a trust estate was to be disposed of quarterly: one-third to the wife of the testator, \$1600 on an annual basis to his sister, and \$3000 on an annual basis to his grandson until he should reach twenty-five years of age. The rest of the income was to be divided into three parts, one of which was to be paid to each of the testator's sons, George and Edward, until the grandson should reach twenty-five. At that time such surplus income was to be paid quarter-yearly to George, Edward, and the grandson. It was provided that should any of the three die leaving issue, the share of any one should go to such issue so long as the other two should live, and if no issue survived, then to the survivors or survivor of the three. George, the son of the testator, died in the middle of a quarterly period and the question was as to whether or not his estate was entitled to his proportion of the income accumulated subsequent to the last distribution date and in the hands of the trustee at the time of his death. *The court decreed that there should be no apportionment on the ground that the gift was contingent upon survivorship at the time of division and distribution, which by the terms of the will was to be quarterly.*

The facts of this cited case are even stronger in supporting the claim of the deceased life tenant's executor than are those of the instant case, because of (1) the absence of a direction to accumulate between income payments; and (2) the short intervals between payments, which could readily have resulted in the court's considering postponement of payment as merely for convenience of the estate or for equalizing the income distributions.

The Supreme Court of Errors of Connecticut had occasion in 1907 to rule upon the construction of a will, the terms of which bore even greater similarity to those contained in the will of Mrs. Browne. In *Green v. Bissell*, 65 Atl. 1056 (Conn.) the will of the decedent gave the residue of the estate to trustees who were directed to invest the corpus of the fund and to dispose of the income and principal as follows: Twelve Hundred Dollars per year was to be paid to the testator's widow during her life out of the net income of the trust estate if the same should be sufficient therefor, and if not then to use so much of the principal as should be necessary. It was directed that payments of this sum should be made to her yearly at least or oftener if she should desire and the trustees found convenient. It was further directed that after the expiration of one year from the testator's decease any excess income over and above the payment of said annual sum to the wife and the expenses incident to the trust should be divided among the testator's six children in specified proportions. The trustees were also directed

“to pay the same to my said children, provided that there shall be such excess of income, as soon

after the end of each year * * * as the amounts so to be paid can conveniently be ascertained.”

The trust was to terminate upon the death of the widow, when a distribution of the fund was to be made in a stipulated manner. The question specifically before the court was as to the right of the estate of a child of the testator who died in the middle of a particular year to share in so much of the net income as was earned and accumulated subsequent to the previous settlement and up to the time of the child's death. It was decreed that there should be no apportionment, the court saying at page 1058 of Volume 65 of the Atlantic Reporter:

“The provisions of the will creating the trust in question provide for an annual accounting by the trustee of the income received by him during the preceding annual period, an appropriation from each annual net balance so ascertained of the sum of \$1200 to the widow, and thereupon the distribution of any remainder of such balance to the testator's children, including the deceased Samuel as long as he should survive, in fixed proportions between them. It is provided that the first of these accountings and apportionments should be made at the expiration of one year from the testator's death, and that the succeeding ones should be had as soon after the end of each year thereafter as they conveniently could be. The purpose and intention of the testator to make each year a distinct financial period, to reduce the gross income for that period into a net balance by deducting therefrom the expenses incident to the management of the trust, to charge thereon, as far as possible, the annuity to the widow as one de anno in annum, and to divide any remaining sum to the children as a fund then for the first time come

into being, is substantially as clear as was the somewhat similar intention of the testator in *Comstock v. Comstock*, 78 Conn. 606, 63 Atl. 449. The intention thus expressed was to give the children, not proportional parts of income generally, but rather proportional parts of an ascertained fund when that fund should from year to year be ascertained. This intention must govern."

A comparison of the factual situation presented in *Green v. Bissell* and that now before this Honorable Court shows that there the primary consideration of the testator was for the yearly payment to his widow, as it here is for the monthly payments to the brothers and sisters of the testatrix. There the surplus income was to be divided among the children of the testator; here, among the brothers and sisters of the testatrix. In both, the trust was to terminate upon the death of the last survivor among those entitled to the per annum or monthly payments and the trust estate was to be divided among stipulated beneficiaries.

The decisions of the Alabama court in *Crawford v. Carlisle*, supra, the Illinois court in *Equitable Trust Co. v. Jennings*, supra, and the Connecticut court in *Green v. Bissell*, supra, clearly and conclusively establish that the estate of Mrs. Baldwin is entitled to no share of the accumulated income in the hands of the trustee at her death.

III.

The Estate of Mrs. Baldwin Is Estopped From Asserting a Construction Which Demands Apportionment.

It is submitted that the executors of the estate of Janet M. Baldwin are now estopped to assert the con-

struction of the last will and testament of Alice Key Browne which would lead to an apportionment of accumulated but undistributed income. Inasmuch as Mrs. Baldwin is the last survivor among the six brothers and sisters provided for by Item LIX, past action by the trustee in making distributions at the end of each triennial period is particularly pertinent. It has been the practice of the plaintiff trustee at the end of each three-year period to distribute one-half of the surplus income to each of the brothers and sisters living at the time. Although each of the five brothers and sisters of Mrs. Baldwin who predeceased her died in the middle of a triennial period, in no case has the estate of any such brother or sister so dying been allocated any portion whatsoever of the surplus income, *all* being distributed to the then surviving brothers and sisters (R. 42-44). This construction and practice had through the years been acquiesced in by Mrs. Baldwin. In fact, she benefited by it infinitely more than did any other brother or sister by reason of the fact that she was the survivor of them and for that reason received at the end of each triennial period during which a brother or sister died, that share of the surplus income to which, under the theory of apportionment, the estate of the deceased brother or sister would have been entitled. The claim of the executors is a derivative claim, and if she would be precluded from asserting it, so is her estate.

See *In re Kelly*, 177 Minn. 311, 67 A. L. R. 1268, and Note 1272.

That the estate of Mrs. Baldwin should be estopped to claim an apportionment of surplus income is buttressed by the fact that, were such apportionment decreed, Murray Baldwin, one of the six legatees pro-

vided for in Item LXII, would share in the estate of Mrs. Browne to an extent surely not contemplated by the testatrix. In her will Mrs. Browne attempted to provide equally for her nieces and nephews, with the exception of John Temple Grayson, Jr. The fact that Mrs. Baldwin survived her brothers and sisters was entirely fortuitous, and by reason of such fortuitous circumstances were apportionment decreed, her heirs or the legatees under her will would benefit directly under the will of Alice Key Browne. As an heir as well as a natural object of Mrs. Baldwin's bounty, her son Murray, one of the legatees under Item LXII and thus already provided for by Mrs. Browne, would be the principal beneficiary were apportionment decreed. In the presence of an integrated scheme to keep the property within the family and to provide, in so far as circumstances permit, *an equitable distribution among all*, it would seem to do violence to such intent of the testatrix were apportionment decreed and were Murray Baldwin thus permitted to obtain a share far greater than would any other of his cousins, the other legatees under Item LXII.

CONCLUSION.

The problem then before this Court is to construe the language employed by Alice Key Browne in Item LXI of her last will and testament to determine whether surplus income shall be held apportionable and whether an accrued portion of such surplus income shall be paid to the estate of a deceased beneficiary who died in the middle of a three-year period. It is submitted that the well-defined rules of law and canons of construction demand the conclusion that the estate of Janet M. Baldwin is entitled to no share whatsoever in any surplus income which may have accrued in the hands

of the trustee up to the time of her death, and that the entire surplus income in the hands of the trustee at that time should go to the nieces and nephews of the testatrix under the provisions of Item LXII.

The sole end in construing a will is to ascertain the intention of the testator, which intention must be ascertained from the language used in the will. The language which the testator uses must be construed in the light of the circumstances at the time of the execution of the will, and every part of the will is to be considered in construing a particular portion thereof. Wills are liberally construed in order to give effect to the intention of testators. Where the testator has evidenced a desire to keep his property within his immediate family and has presented a well-integrated scheme which looks to the distribution of his property to his blood relations, such purpose is to be favored by a court in determining the meaning of language used.

Where there are no words of gift independent of a direction as to the time for payment, the legacy is construed to be contingent, and, in order to take, the legatee must survive until the time for division and distribution. There are no circumstances here which might justify the court in finding a construction of vesting, particularly in view of the well-stated intent of the testatrix. The gift of surplus income is one to a class, and under the authorities members of that class must survive until the time for distribution in order to be entitled to take. The construction here demanded is supported by the holdings of the Alabama, Illinois, and Connecticut courts upon facts substantially similar to those here presented. In any event, equity and justice demand that no apportionment be

allowed for the reason that Janet M. Baldwin during her lifetime substantially benefited by such apportionment not being allowed upon the distributions of past triennial dividends after the death of predeceasing brothers and sisters.

It is submitted, therefore, that this Honorable Court should affirm the decree of the Court below ordering the Trustee herein to pay all surplus income which accrued after the last triennial distribution date according to the terms and provisions of Item LXII to the nieces and nephews therein named, and that no portion whatsoever of said surplus income go to the appellants, the executors of the Estate of Janet M. Baldwin.

Respectfully submitted,

WALTER M. BASTIAN,

*Attorney for Said Appellees, Edward
Turner Messersmith, Executors of
Estate of Richard M. Cutts, De-
ceased, Alice G. Cutts Myers, Dan-
iel K. Turner, Jr., Anna Key
Palmer (formerly Anna Mace), and
Wells Fargo Bank & Union Trust
Co.*

HELLER, EHRMAN, WHITE & MCAULIFFE,
Of San Francisco, California,
Of Counsel.

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COURT OF APPEALS
DISTRICT OF COLUMBIA
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Court of Appeals, District of Columbia

No. 6454

MURRAY BALDWIN, individually, and MURRAY BALDWIN
and DAVID COSGRAVE, executors of the estate of
Janet Baldwin, deceased, *Appellants*,

v.

NATIONAL SAVINGS AND TRUST COMPANY, a corporation,
trustee under the last will and testament of Alice
Key Browne, deceased, et al., *Appellees*.

APPELLANTS' REPLY BRIEF.

CHARLES D. HAMEL,
RAYMOND BENJAMIN,
Attorneys for appellants.

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APPELLANTS' REPLY BRIEF.

There is an outstanding factor in this case which distinguishes it from the authorities relied upon by appellees and which vitiates their entire argument. The effect of this factor although fully referred to and emphasized in our opening brief is not answered by them.

We showed in the first three subdivisions of our brief (pp. 6, 11 and 15) that the will specifically severs the one-half of the accumulated income which is to go to the brothers and sisters, or their survivor, from the

corpus of the estate, and that it never became part of the corpus of the estate, but was a separate and distinct fund lifted from the corpus and entirely foreign thereto. It specifically provides that one-half of this accumulated income is to be added to the corpus of her estate, clearly and obviously severing the other one-half from the corpus and making a separate fund thereof. This we pointed out on pages 6-10 of our opening brief, and appellees have not been able to refute this self-evident proposition.

Now, as the one-half accumulated income which is the fund involved here never was part of the corpus of the estate, but was a separate and distinct fund cut off from the corpus and *given a separate entity, the provisions of Item LXII* that upon the death of the last surviving brother or sister the estate should be distributed to the nephews and nieces *has no application to this separate fund*. As it was severed from the estate and made a separate and distinct entity, Item LXII which purports to deal only with the estate and not this separate fund, does not dispose of it upon the death of the survivor of the brothers and sisters. Thus we find no remainder over in this separate fund, no direction that the accumulation thereof upon the death of the last survivor shall go to any one, and no provision that the legacy should lapse in the event of the death of the last survivor. In short, unless the brothers and sisters, or their survivor, had a vested interest in this fund which passed to the heirs of the survivor upon his or her death, we have a fund severed from the estate, the beneficial interest in which is vested in no one, which is not disposed of by the will, and for which no remainder over is created. We have a fund which belongs to no one and which is undisposed

of. We have then a condition abhorrent to the law. On the other hand if this separate fund were vested in the brothers or sisters, or their survivor, there was no need of designating to whom it should pass upon the death of the last survivor of the brothers and sisters because it follows by operation of law that it was the property of that survivor and passed to his heirs or legatees. In short, if the interest of the brothers and sisters in this separate fund is considered vested, the will is complete, the failure to create a remainder over is understandable, and a situation consonant and not abhorrent in law exists.

The appellees have not attempted to answer the foregoing proposition or to show that this fund to go to the brothers and sisters was not a fund cut off from the estate, and separate and distinct therefrom. In face of the provisions of the will which provide that "the other one-half shall be added to the corpus" the implication is so clear that the one-half for the brothers and sisters was not part of and never became part of the corpus, but was a separate fund, that it is no wonder appellees cannot contend otherwise.

Granting this was a separate fund from its inception because it was clearly never part of the corpus, a series of necessary implications arise therefrom which render untenable the arguments of appellees and make the authorities cited by them inapplicable. It is this factor of a separate fund severed from the corpus which we said was the determining feature of this case distinguishing it from the authorities relied upon by appellees and vitiating their arguments.

The effect of this factor on their argument is at once apparent. For instance, appellees assert that there is a "definite provision made in Item LXII for a re-

mainder over'', (Appellees br. p. 10) and they argue that since there was a provision for a remainder over after the death of the last survivor, of course the accumulated fund goes to the remaindermen and not to the heirs of the survivor. But this mere assertion that there was a provision for a remainder does not make it so. The will does not say what is to become of the separate fund set apart for the brothers and sisters. It says the other half of the accumulating fund is to be added to the corpus, and it says that the estate including this other half shall pass to the remaindermen upon the death of the last surviving brother and sister, *but nowhere does it say that the half which is not to be added to the corpus but which is to be kept separate and distinct therefrom is to go to any remaindermen.* Item LXII clearly refers to the corpus of the estate and not to this fund which was not part of that corpus. As to that fund there was no remainder provided for; showing clearly that testatrix contemplated it as the property of the brothers and sisters, or the survivor of them, which passed to the heirs or legatees of such survivor, and therefore, which it was unnecessary to dispose of in her will.

Similarly appellees, assert there was no present gift of this fund to the brothers and sisters, or their survivor, but merely a gift in the future. In other words, that no one had any interest in this fund while it accumulated and that no one was the equitable owner thereof except at triennial payment periods. As we have pointed out in our opening brief (p. 18 *et seq.*) estates are deemed to vest immediately unless there is a clear manifestation of a contrary intention. The law abhors the existence of property without ownership just as nature abhors a vacuum. As this was a

separate and distinct fund and not part of the corpus of the estate given to the remaindermen if it did not vest in the brothers and sisters, or their survivor, it was a fund owned by no one and in which no one had a vested beneficial interest, and in which no one had a remainder interest created by the will. Such a condition the law will avoid if possible, and it can be avoided by following the legal presumption invoked by us that estates will be presumed to vest at the earliest possible moment. To hold that this fund vested relieves the whole situation, and instead of the legal anomaly of ownership suspended in mid-air without a remainder, we have vested ownership which the law favors.

On this point of a gift vesting in the future instead of the present appellants quote from *Smith's Estate*, (Pa.) 75 Atl. 425. *But this decision is against their position.* There the question was whether a gift of accumulating income to be paid at a future time was vested or contingent. The court held it was vested. The court there says:—

“If it is doubtful whether a legacy is vested or contingent the doubt must be resolved in favor of a vested interest. . . . The law always and naturally inclines to attribute the real and substantial ownership of property to some existing person even in the case of a trust and never to leave any part of it in abeyance.”

So, following there the rule we invoke here, the court held that the gifts of the accumulated funds, although payable in the future, were vested, and refused to hold, as appellees claim here, that the equitable ownership of the fund remained in abeyance until the time of payment.

The other cases cited by appellants respecting fu-

turity annexed to a gift do not militate against our position. They merely hold that where the only evidence of a gift is a direction to pay in the future, that the gift is not vested. But no such situation exists here. Here we have a fund carved out and severed from an estate and directed to be paid triennially to certain persons. Upon the creation of this separate fund title thereto vested in some one and was not held in abeyance. There was not a mere direction to pay money in the future. There was also the present carving out and establishment of a separate estate, the ownership of which must have been vested. Thus we see that it is the creation of this fund separate from the corpus which makes the cases on futurity annexed to a gift cited by appellees inapplicable.

As we anticipated (p. 41 our brief) appellees invoke the "pay and divide rule" and cite three cases in N. Y. S. in support thereof. We have shown (pp. 41-43 appellants' brief) that the pay and divide rule is not held in favor, and that the judicial desire to construe estates as vested makes the courts hesitate to apply it except in the clearest of cases. We there pointed out that one of the exceptions to this rule supported by many cases is where the subject matter of the legacy has been severed from the corpus of the estate. This factor is considered as a clear indication of an intention that the gift shall vest immediately (see L. R. A.—1918 E, p. 1126) and numerous cases there cited. This factor exists in this case and therefore makes the pay and divide rule inapplicable. It does not exist in the N. Y. S. cases cited by appellees and therefore those cases are clearly not applicable.

Moreover, these N. Y. S. cases have other features besides the absence of the severance of the subject

matter of the gift from the corpus of the estate which distinguishes them from the case at bar. In the case of *in re Leverine*, 210 N. Y. S. 605, the main question was whether the residue upon the death of the life tenant went to the remaindermen *per stirpes* or *per capita*. Moreover, the will directed that upon the death of the life tenant the executors should "pay, divide and distribute" to a *class* the members of which were unknown and undesignated and could not be ascertained until the time for payment arrived, and therefore it was held that the testator meant to give only to those who were living when the members of the class were to be ascertained. Here, however, the persons to take the fund were designated and the fund was immediately set apart and severed from the estate and given to them. The gift was not postponed, merely the enjoyment thereof for convenience was deferred.

The case of *in re Hopner's Will*, 266 N. Y. S. 430, can be differentiated for the same reasons. There no fund was separated from the estate and set apart for the legatee. Moreover, that case supports our contention that the accumulating income up to the time of death of the legatee passes to the estate of the legatee. There the testator directed the trustees to divide the income semi-annually between his son and daughters, and when the son died without issue before the termination of the trust the son's estate was held entitled to *the income accruing up to his death* but not thereafter.

In re Billing's Estate, 110 Atl. 767 (Pa.), was a gift to a class undesignated and unascertained until the time of payment and no fund was set apart from the estate to make this gift. The same distinguishing features apply to the case of *in re Westchester Trust Co.*, 159 N. Y. S. 887.

The decisions of *Crawford v. Carlisle*, 89 So. 565, *Equitable Trust Co. v. Jennings*, 189 Ill. App. 359, and *Green v. Bissell*, 65 Atl. 1056, upon which great reliance is placed by the appellees are susceptible of the same broad differentiation from the case at bar as the other decisions above referred to. In the first place in none of these decisions was a fund which was the subject of the gift set apart and severed from the corpus of the trust. The moneys disposed of in those three cases remained in the body of the corpus until the time for the payment thereof to the persons entitled thereto and the beneficial ownership thereof was always vested in some one. In the present case, however, the fund which was the subject of the gift was separated from the corpus and made a distinct estate and entity, so that unless title thereto immediately vested in the brothers and sisters, or their survivor, there was no one owning the beneficial interest in the fund and there was no remainder over. This factor, as we have said before, makes this case entirely different from the three cases last mentioned. Moreover, these three cases are opposed to the current of authority which holds that where title has vested subject to future enjoyment, death before such enjoyment does not divest the title and the accruing income, although payable in the future, is apportioned to the estate of the person entitled thereto as of the date of his death. This rule of apportionment is the general rule, (see cases cited pp. 35-37 appellants' opening brief) and the last-mentioned three decisions are opposed to it and violative of the general rule on the subject. As we have pointed out, suppose this income had been payable monthly or bi-monthly instead of every three years. It would be ridiculous in face of the rule of apportionment general-

ly prevailing to hold that the amount accrued to the date of death was not the property of Janet M. Baldwin. The mere fact that the income was payable every three years instead of every month cannot possibly change this principle.

The case of *Crawford v. Carlisle*, *supra*, did not involve the question of apportionment and the statement of the court that the income went to the children who survive each recurring dividend period was clearly dicta and not supported by any reference to authorities.

In the case of *Equitable Trust Co. v. Jennings*, *supra*, there was no fund set apart from the corpus of the estate, but it was provided that the income was to be paid at certain periods to persons then surviving. While the court there held that there should be no apportionment on the ground that the gift was contingent upon survivorship, it violated the apportionment rule above referred to, and in addition to that, it was not dealing with a fund which had been severed from the estate and the title to which must have vested at the time of severance in the persons entitled thereto.

The decision in the case of *Green v. Bissell*, *supra*, also did not deal with a fund which had been set apart and severed from the corpus. The main question in that case was whether stock dividends were to be considered as income to the life tenant or belong to the remaindermen. This case also failed to follow the prevailing rule about apportionment and as it was not dealing with a separate fund the title to which had already vested in the persons entitled thereto, it cannot apply to this case or govern the decision thereof.

The claim that Mrs. Baldwin is estopped from demanding an apportionment of the income to her estate

is answered on pp. 43-48 of appellants' opening brief. No estoppel of any kind is shown. There is no evidence that the heirs of the brothers and sisters who died before Mrs. Baldwin did not perfect some arrangement with the surviving brothers or sisters for the apportionment of the fund. For all that the record shows, while the surviving brothers and sisters may have received the fund, they may have between themselves apportioned a part of it to the heirs of such brother or sister who died during the triennial period. The mere receipt by Mrs. Baldwin of her portion of these triennial payments creates no estoppel against her. *It does not show that this misled or induced any one of the appellees to alter or change his position in any respect.* There is nothing to show here that the appellees changed their position to their disadvantage in any respect relying upon the fact that she received any part of these triennial settlements. Consequently the mere acceptance of triennial settlements means nothing in this case and certainly does not preclude the executors of Mrs. Baldwin's will from contending that the fund accumulated up to the time of her death was her property. This is a controversy between the personal representative of the last life beneficiary and the remaindermen and whatever was done among the life tenants between themselves could not in any wise affect the amount accruing to the remaindermen or change the position of the remaindermen in any respect.

Counsel argues that John Temple Grayson, son of Elizabeth H. Turner, one of the deceased sisters, and a nephew of the decedent was discriminated against by the testatrix in her will, and that she showed plainly that she did not wish him to be the recipient of her

bounty. They argue from this that if Elizabeth H. Turner had died during the triennial period and had a vested interest in the accumulated fund which would pass to her heirs, that John Temple Grayson would thus receive indirectly from the testatrix a portion of the income from her estate, and that therefore the will should be construed so as to prevent such a happening. We are not dealing with Mrs. Turner's interest in this fund. She died during one of the triennial periods and whether her son received any of her property or not is a matter of no concern to this court. We are dealing with the right of the estate of Baldwin to the accumulating fund up to the date of the death of Mrs. Baldwin, and as she had a vested interest in this fund it clearly went to her estate. But the argument about John Temple Grayson falls for another reason. While it is true that the testatrix did not wish Grayson to receive any of her bounty directly from her estate, she placed no restrictions upon his mother Mrs. Turner giving him property, even though the mother may have received it from the testatrix' estate. She was not making a will for any of her brothers' or sisters' estates, and she was not disposing of their property, and the fact that a nephew whom she disliked might receive property which belonged to her sister Mrs. Turner, even though it came from her, cannot affect the construction of this will. The accumulating fund severed from her estate passed to and became vested in her brothers and sisters. She made no attempt to dispose of that fund to others in case they did not receive it. She declared no remainder over therein. Having so vested in the brothers and sisters they could leave it to whomsoever they pleased, irrespective of whether the party to whom it was left was disliked by the testatrix or not.

The brothers and sisters of the testatrix were her nearest kin. Her primary object was to look out for them. The interests of her nephews and nieces were secondary. This is clearly indicated by the will. It is inconceivable that she intended that a brother or sister should have no vested interest in this accumulating fund severed and set apart for them until the triennial period. It is inconceivable that she should have intended that during that triennial period no matter what the needs of such brother or sister may have been, no matter whether they have been destitute or in great need of funds, that they could not borrow against this accumulating fund, or get the benefit of it in any way. It is inconceivable that she intended that even though a brother or sister was destitute or in dire need of funds and lived to within two days or one-half hour of the triennial period that such brother or sister would have no benefit from the accumulation. This consideration is a cogent argument that the estate in this fund was vested in the brothers and sisters, and the survivor of them.

In this connection there is one further consideration to which we call the court's attention. The will provides that upon the death of a brother or sister, and until the death of all the brothers and sisters, the issue of such deceased brother or sister should receive one-half of what the deceased brother or sister would have received. Under this provision upon the death of the brothers and sisters other than Mrs. Baldwin, the appellees received approximately \$8,000.00, yet they now contend that Murray Baldwin should not have his mother's vested interest in this accumulating fund, but should merely have the same proportion which they will receive therein, even though they have received

more than he through the provision of the will just referred to. A construction which gives them \$8,000.00 more than he, and merely gives him the same share which they will get in the present accumulations would be extremely unfair. This consideration indicates that the construction contended for by us is more consonant with the wishes and intent of the testatrix, than the construction claimed by the appellees.

We respectfully submit that the estate of Janet M. Baldwin is entitled to the one-half of the fund accumulated from April 18th, 1932, up to the date of her death, and that judgment in this action should be in favor of the executors of her will.

Respectfully submitted,

CHARLES D. HAMEL,
RAYMOND BENJAMIN,
Attorneys for appellants.

HERBERT W. ERSKINE,
Of Counsel.